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THE LAST LINE OF DEFENSE: FEDERAL  
HABEAS REVIEW OF MILITARY DEATH PENALTY CASES

A Thesis

Presented to

The Judge Advocate General's School,  
United States Army

The opinions and conclusion expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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42D JUDGE ADVOCATE OFFICER GRADUATE COURSE

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THE LAST LINE OF DEFENSE:  
FEDERAL HABEAS REVIEW OF MILITARY DEATH PENALTY CASES

by

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ABSTRACT: The thesis surveys the law that will govern federal habeas review of military death penalty cases. Presenting original research concerning the United States District Court for the District of Kansas' military habeas practice, the thesis concludes that the scope of review currently used in habeas challenges to court-martial convictions would not provide a condemned servicemember a meaningful opportunity to challenge his death sentence through federal habeas review. The thesis then examines the right to counsel during federal habeas review and concludes that while habeas petitioners under state and federal death sentences would have a guaranteed right to counsel, a military habeas petitioner would not. The thesis proposes legislation to address both of these limitations on meaningful federal habeas review of military death penalties.

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## I. Introduction

The U.S. military's last execution occurred on April 13, 1961. In the United States Disciplinary Barrack's boiler room,<sup>1</sup> Army Private First Class John A. Bennett "waited calmly as Col. Weldon W. Cox, USDB commandant, read the orders of execution and the sentence."<sup>2</sup> When Colonel Cox asked the condemned soldier if he wanted to make a final statement, Bennett answered, "Yes. I wish to take this last opportunity to thank you and each member of the staff for all you have done in my behalf." Colonel Cox replied, "May God have mercy on your soul."<sup>3</sup>

Bennett paused at the head of the 15-foot ramp leading to the gallows and asked the chaplain to pray for him.

The guards walked Bennett quickly down the ramp. He was turned around to face the witnesses. A black hood was placed over his head, and the noose adjusted. The trap was sprung at 5 minutes and 17 seconds after midnight by an Army sergeant.

Pronouncement of death came 16 minutes later by the senior medical officer present. The officer saluted Colonel Cox, indicating the execution had been carried out according to instructions.<sup>4</sup>

Bennett's execution ended more than six years of litigation. After the Army Board of Review and the Court of Military Appeals affirmed the death penalty,<sup>5</sup> Bennett twice unsuccessfully petitioned the Kansas federal district court for a writ of habeas

corpus, twice filed unsuccessful appeals with the Tenth Circuit,<sup>6</sup> and unsuccessfully petitioned the Court of Military Appeals for a writ of error coram nobis.<sup>7</sup>

The United States carried out a total of 160 executions as a result of court-martial sentences between 1930 and 1961.<sup>8</sup> But since 1957, when President Eisenhower authorized Bennett's execution,<sup>9</sup> no military death sentence has received presidential approval.<sup>10</sup> This 37-year hiatus may soon end. As of January 1994, there were eight servicemembers under adjudged death sentences, four of whose sentences had been affirmed by Courts of Military Review.<sup>11</sup> The Court of Military Appeals has already rejected a systemic challenge to the military's death penalty scheme.<sup>12</sup> If the Court of Military Appeals affirms a capital case and the Supreme Court either denies certiorari or affirms the Court of Military Appeals' holding, the President will decide whether to approve the death sentence.

Once a death sentence receives presidential approval, the case will enter the federal habeas corpus arena.<sup>13</sup> The threshold question will then be how to provide the condemned servicemember with counsel. That question is of critical importance. As one set of researchers studying federal habeas review concluded, "[T]he availability of professional representation is the single most important predictor of success in federal habeas corpus."<sup>14</sup>

This thesis first presents an overview of federal habeas corpus review of courts-martial and considers whether habeas is a meaningful forum for vindicating condemned servicemembers'

constitutional rights. In keeping with Justice Holmes' admonition that "[t]he life of the law has not been logic; it has been experience,"<sup>15</sup> this section surveys the Kansas federal district court's habeas practice during 1992 and 1993.

The thesis then analyzes the current state of law concerning appointment of counsel for servicemembers under death sentences who are seeking federal habeas relief. This analysis will necessarily be speculative. Since PFC Bennett's 1961 execution, the law governing appointment of counsel for indigent habeas petitioners has undergone a sea change; no case has yet arisen to test these developments' impact on federal habeas corpus review of capital courts-martial.

After examining the law as it currently exists, the thesis considers the law as it should exist; this section argues that indigent servicemembers on death row should receive appointed counsel during habeas review. The thesis then considers three options for providing habeas counsel to military death row inmates. Finally, the thesis proposes legislation designed to promote more meaningful habeas review than condemned servicemembers would receive under current law.



## II. Habeas Corpus Review of Courts-Martial: An Overview

*The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom.*

*--United States Supreme Court<sup>16</sup>*

### A. *The Right to Collaterally Attack a Capital Court-Martial Through Habeas Corpus*

"The statutory authority for habeas corpus relief for military accused is 28 U.S.C. § 2241."<sup>17</sup> That statute allows "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction" to issue writs of habeas corpus to prisoners "in custody under or by color of the authority of the United States."<sup>18</sup> Because prisoners confined while pending a military death sentence<sup>19</sup> are "in custody under or by color of the authority of the United States," they fall under 28 U.S.C. § 2241. The Supreme Court has expressly noted that 28 U.S.C. § 2241 provides the "federal civil courts" with habeas corpus jurisdiction over military death penalty cases.<sup>20</sup>

On its face, Article 76 of the Uniform Code of Military Justice may appear to preclude habeas corpus review of court-martial convictions. That article provides, in part, "Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for new trial," remission or suspension

by the Secretary concerned, and presidential actions.<sup>21</sup> The Supreme Court, however, has concluded that Congress did not intend Article 76's predecessor under the Articles of War<sup>22</sup> to deprive the federal judiciary of habeas corpus jurisdiction over courts-martial.<sup>23</sup> Additionally, the Uniform Code of Military Justice's legislative history is replete with assertions that Congress did not intend Article 76 to preclude federal habeas review of courts-martial.<sup>24</sup>

Condemned servicemembers' ability to collaterally attack their death sentences continues unabated in the wake of the Military Justice Act of 1983,<sup>25</sup> which extended the Supreme Court's certiorari jurisdiction to include decisions of the Court of Military Appeals.<sup>26</sup> Logically, such discretionary Supreme Court jurisdiction should no more limit servicemembers from seeking a writ of habeas corpus under 28 U.S.C. § 2241 than the Supreme Court's similar certiorari jurisdiction over state cases<sup>27</sup> limits state prisoners from seeking a writ of habeas corpus under 28 U.S.C. § 2254.<sup>28</sup> The Supreme Court's role is not to scrutinize individual records for constitutional error;<sup>29</sup> rather, the Court will grant certiorari only for "special and important reasons."<sup>30</sup> Because "denials of certiorari are not decisions on the merits and have no precedential value,"<sup>31</sup> they indicate nothing about the Supreme Court's view of the case. Rather, a denial of certiorari indicates only that the Court does not want to resolve the issues presented in the petition at that

time. Thus, certiorari is not an adequate substitute for habeas review in a federal district court.

Nevertheless, in litigation before the Claims Court,<sup>32</sup> the United States argued that "the availability of *certiorari* to the United States Supreme Court now forecloses further civil court collateral attacks on court-martial convictions."<sup>33</sup> In *United States v. Matias*, the Claims Court rejected that argument, relying heavily on the Military Justice Act of 1983's legislative history.<sup>34</sup> The court concluded:

In view of the statutory language and the extensive testimony throughout the hearings, this Court finds that the narrow window of collateral attack review given to this Court remains open, but only for those issues that address the fundamental fairness in military proceedings and the constitutional guarantees of due process. . . . If Congress did, in fact, intend to eliminate all collateral attacks, despite its failure to specifically state such an intent in the statute, then the statute must be remedied by Congress and not by this Court.<sup>35</sup>

On appeal, the Federal Circuit also reviewed the Military Justice Act's legislative history and "conclude[d] that the Claims Court properly exercised its jurisdiction to hear Matias' collateral attack on his court-martial."<sup>36</sup>

The case for Article III courts' continued power to issue writs of habeas corpus is even stronger than the case for

continued collateral review by the Claims Court.<sup>37</sup> The Senate Armed Services Committee's report on the Military Justice Act of 1983 states:

[T]he authority for review of the decisions of the Court of Military Appeals by the Supreme Court . . . does not affect existing law governing collateral review in the Article III courts of cases in which the Court of Military Appeals has granted review. The Committee intends that the availability of collateral review of such cases be governed by whatever standards might be applicable to the availability of collateral review of civilian criminal convictions subject to direct Supreme Court review.<sup>38</sup>

Consistent with the Senate Armed Service Committee's view, the Second Circuit has suggested that the Military Justice Act of 1983 did not limit federal district courts' habeas power over military prisoners.<sup>39</sup> No reported case has reached the opposite conclusion. Perhaps the strongest indication that the Act did not affect collateral review of courts-martial is Article III courts' continued, though infrequent, practice of issuing writs of habeas corpus in military justice cases.<sup>40</sup> A petition for a writ of habeas corpus thus remains a viable means to challenge a military death sentence.

#### *B. The Scope of Federal Habeas Review of Courts-Martial*

Although Article III courts retain the statutory power to review military capital cases through habeas proceedings, the

value of such habeas review is open to question. The scope of Article III courts' review of court-martial convictions determines whether the writ of habeas corpus will provide meaningful protection for condemned servicemembers' constitutional rights.<sup>41</sup>

1. *The Full and Fair Consideration Standard.*--Until the Korean War, Supreme Court precedent limited federal habeas review of military justice cases to resolving whether "the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers."<sup>42</sup> "The Supreme Court's break with tradition came in 1953 with its decision in *Burns v. Wilson*,"<sup>43</sup> in which "at least seven Justices appeared to reject the traditional view and adopt the position that civil courts on *habeas corpus* could review claims of denials of due process rights to which the military had not given full and fair consideration."<sup>44</sup>

*Burns v. Wilson* arose from the rape and murder of a civilian in Guam. Three Air Force enlisted men, Staff Sergeant Robert W. Burns, Private Herman P. Dennis, Jr., and Private Calvin Dennis, were convicted of the offenses and sentenced to death.<sup>45</sup> The appellate bodies within the Office of the Judge Advocate General of the Air Force found the proceedings to be legally sufficient.<sup>46</sup> At the Judge Advocate General's recommendation, President Truman confirmed Staff Sergeant Burns' and Private Herman Dennis' sentences and ordered that they be hanged.<sup>47</sup> Also

at the Judge Advocate General's recommendation, President Truman commuted Private Calvin Dennis' sentence to life imprisonment.<sup>48</sup>

The two condemned servicemembers sought habeas relief from the United States District Court for the District of Columbia.<sup>49</sup> Finding that it only had the power to "determine whether or not the court martial before which a petitioner is tried was lawfully constituted, had jurisdiction of the person and offense, and imposed a sentence authorized by law," the district court dismissed the habeas petitions.<sup>50</sup>

On appeal,<sup>51</sup> the District of Columbia Circuit adopted a less restrictive scope of review:

(1) An accused before a court-martial is entitled to a fair trial within due process of law concepts. (2) The responsibility for insuring such fairness and for determining debatable points is upon the military authorities, and their determinations are not reviewable by the courts, except (3) that, in the exceptional case when a denial of a constitutional right is so flagrant as to affect the "jurisdiction" (*i.e.*, the basic power) of the tribunal to render judgment, the courts will review upon petition for *habeas corpus*. To support issuance of a writ of *habeas corpus* the circumstances shown by the papers before the court must so seriously affect the fundamental fairness of the trial and the validity of the appellate and

later determinations as to deprive the military authorities of jurisdiction, *i.e.*, of power to act.<sup>52</sup>

The court then discussed and rejected the petitioners' claims.<sup>53</sup>

The Supreme Court granted certiorari<sup>54</sup> and, in a sharply fragmented decision, affirmed the denial of habeas relief.<sup>55</sup> In an opinion written by Chief Justice Vinson, a four-Justice plurality addressed the appropriate scope of review and concluded that "[i]t is the limited function of the civil courts to determine whether the military have given fair consideration to each of [the petitioner's] claims."<sup>56</sup> However, where military courts have "manifestly refused to consider [a habeas petitioner's] claims," federal district courts may review such claims *de novo*.<sup>57</sup>

Justice Jackson simply concurred in the result without comment.<sup>58</sup> Justice Minton also concurred in the judgment, but applied a scope of review far different from the plurality's. He contended that in reviewing courts-martial, "[w]e have but one function, namely, to see that the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction."<sup>59</sup>

In an unusual opinion, Justice Frankfurter neither concurred nor dissented, but called for the case to be reargued.<sup>60</sup> He opined that federal courts' power in reviewing court-martial convictions is not as broad as their power in reviewing state court convictions, but is broader than a simple determination of whether the court-martial had jurisdiction.<sup>61</sup>

Justice Douglas, joined by Justice Black, dissented.<sup>62</sup> The dissent observed that "it is clear from our decisions that habeas corpus may be used to review some aspects of a military trial," and that such "review is not limited to questions of 'jurisdiction' in the historic sense."<sup>63</sup> After concluding that the Fifth Amendment's ban on coerced confessions applies to "military trials," the dissent contended that "like the accused in a criminal case," a "soldier or sailor" convicted through the use of a coerced confession "should have relief by way of habeas corpus."<sup>64</sup>

No rationale won the support of more than four Justices.<sup>65</sup> While the lack of a majority opinion muddled the decision's implications for the proper scope of review, its implications for Burns and Dennis were clear; they were hanged at Northwest Military Air Field, Guam, on January 28, 1954.<sup>66</sup>

2. *The Tenth Circuit's Approach.*--Since *Burns*, federal courts have taken "diverse approaches to constitutional challenges to military convictions, ranging from strict refusal to review issues considered by the military courts to *de novo* review of constitutional claims."<sup>67</sup> In fact, federal courts' approaches have been so diverse that "it is sometimes difficult to reconcile the various standards applied within individual courts."<sup>68</sup> Thus, it is "virtually impossible to predict with any degree of confidence the scope of review most federal courts will apply in any particular" habeas review of a court-martial.<sup>69</sup>



Nowhere has such uncertainty been greater than in the Tenth Circuit.<sup>70</sup>

The Tenth Circuit's approach to habeas corpus review of courts-martial is crucial in military death penalty cases. "[A] prisoner may apply for a writ of habeas corpus either in the district where he is incarcerated" or the district in which the prisoner's "immediate" custodian is located.<sup>71</sup> For inmates on the military's death row, which is housed in the United States Disciplinary Barracks at Fort Leavenworth,<sup>72</sup> both they and their immediate custodian are located in the District of Kansas. The Tenth Circuit's case law will therefore govern habeas corpus review of military capital cases.<sup>73</sup>

Until recently, most Tenth Circuit military habeas decisions "strictly adhere[d] to the *Burns*' 'full and fair' consideration test."<sup>74</sup> In its 1959 rejection of PFC Bennett's habeas challenge to his death sentence, for example, the Tenth Circuit Court of Appeals noted that "we inquire only to determine whether competent military tribunals gave full and fair consideration to all of the procedural safeguards deemed essential to a fair trial under military law."<sup>75</sup>

In 1986, the Tenth Circuit began to gradually expand the scope of review. *Mendrano v. Smith*<sup>76</sup> reached the merits of a military habeas petitioner's constitutional claim that had already been rejected by the military courts. The court of appeals reasoned that it would review the claim "since the Constitutional issues raised are substantial and largely free of

factual questions, and since the Government does not argue that full and fair consideration by the military courts makes judicial review inappropriate."<sup>77</sup>

In 1990, two Tenth Circuit Court of Appeals decisions further developed the scope of review. In the first of these cases, *Monk v. Zelez*,<sup>78</sup> the court noted that while it followed the *Burns* "deferential" scope of review, "[i]n appropriate cases" the court would "consider and decide constitutional issues that were also considered by the military courts."<sup>79</sup> Even though the Court of Military Appeals had already rejected an appeal challenging the constitutionality of the reasonable doubt instruction at Monk's court-martial,<sup>80</sup> the Tenth Circuit Court of Appeals held that the issue was "subject to our further review because it is both 'substantial and largely free of factual question.' "<sup>81</sup>

Later that same year, the Tenth Circuit Court of Appeals' *Dodson v. Zelez*<sup>82</sup> opinion considered the scope of review in even greater detail. *Dodson* expressly adopted the Fifth Circuit Court of Appeals' *Calley v. Callaway*<sup>83</sup> standard. In *Calley*, the court of appeals reversed a federal district court's grant of habeas relief to First Lieutenant William Calley, who was then confined at the United States Disciplinary Barracks as a result of his court-martial conviction stemming from the My Lai massacre.<sup>84</sup> The Fifth Circuit Court of Appeals' en banc opinion adopted four factors to determine whether a federal habeas court should review a constitutional challenge to a court-martial conviction:

(1) "The asserted error must be of substantial constitutional dimension;"<sup>85</sup> (2) "The issue must be one of law rather than of disputed fact already determined by the military tribunals;"<sup>86</sup> (3) "Military considerations may warrant different treatment of constitutional claims;"<sup>87</sup> and (4) "The military courts must give adequate consideration to the issues involved and apply proper legal standards."<sup>88</sup>

In 1991, the Tenth Circuit Court of Appeals further refined the four-part *Calley/Dodson* test. *Khan v. Hart*<sup>89</sup> considered a habeas petitioner's argument that Article 56 of the Uniform Code of Military Justice,<sup>90</sup> which gives the President the power to prescribe maximum punishments for court-martial offenses, was an unconstitutional delegation of legislative power.<sup>91</sup> Using the four *Calley/Dodson* criteria to guide its inquiry, the court weighed several factors supporting review against one countervailing factor<sup>92</sup> and concluded, "[W]e strike the balance in favor of review."<sup>93</sup> Thus, *Khan* "applied *Dodson* as a balancing test to determine whether federal review of the issues was appropriate."<sup>94</sup>

In 1993, however, the Tenth Circuit Court of Appeals used a different approach in applying the four *Calley/Dodson* criteria. *Lips v. Commandant, U.S. Disciplinary Barracks*<sup>95</sup> involved the United States' appeal of a district court decision granting habeas relief to a military prisoner.<sup>96</sup> The court of appeals held:

[A]lthough the federal district court had jurisdiction to entertain Lips' petition, its scope of review was initially limited to determining whether the claims Lips raised in his federal habeas corpus petition were given full and fair consideration by the military courts. If they were given full and fair consideration, the district court should have denied the petition.<sup>97</sup>

The *Lips* opinion cited the four *Calley/Dodson* criteria and maintained "that review by a federal district court of a military conviction is appropriate only if the . . . four conditions are met[.]"<sup>98</sup> The opinion indicated that where military courts have "fully and fairly considered, and then rejected, [the petitioner's] claim, . . . the federal district court should not [undertake] further inquiry."<sup>99</sup>

In sharp contrast to *Khan's* balancing approach, *Lips* appears to hold that an issue is reviewable only if *all four* *Calley/Dodson* factors support review.<sup>100</sup> The *Lips* scope of review is remarkably narrow, essentially reinstating the Tenth Circuit's strict adherence to the *Burns* full and fair consideration test. In the Tenth Circuit, an issue that is raised before a military court is deemed "fully and fairly considered" even if the military court rejects the claim without explanation.<sup>101</sup> On the other hand, if a claim has not been presented before a military tribunal, absent "cause excusing the procedural default and prejudice resulting from the error," the claim has been waived

for federal habeas purposes.<sup>102</sup> Thus a claim not raised before the military courts will not be reviewed, but a claim that was raised before the military courts cannot be the basis for relief. The only way to escape from this Catch-22 is if the military courts *expressly* refused to consider an issue.<sup>103</sup> In the one instance where federal habeas courts apply the full and fair standard to state courts' constitutional rulings,<sup>104</sup> relief will not be granted even if "the state courts employed an incorrect legal standard, misapplied the correct standard, or erred in finding the underlying facts."<sup>105</sup> It would be a rare case, indeed, that would qualify for review under this standard.

In a series of military habeas opinions announced after the Court of Appeals' *Lips* decision, the Kansas federal district court argued that the Tenth Circuit's scope of review precedent is in conflict with itself.<sup>106</sup> The district court maintained that "[t]he balancing test suggested in *Khan* and the adequate consideration only test suggested in *Lips* create an incongruence not easily resolved. While in some cases analysis under either test would lead to the same result, in others, the outcome would clearly be different depending upon which test was utilized."<sup>107</sup> Nevertheless, the Supreme Court denied *Lips*' certiorari petition.<sup>108</sup>

One panel of the Tenth Circuit Court of Appeals ostensibly "cannot overrule the judgment of another panel"; rather, a panel is "bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme

Court."<sup>109</sup> The Tenth Circuit Court of Appeals sitting en banc should therefore resolve the conflict in its scope of review precedent.<sup>110</sup> Until the court resolves this issue en banc, the scope of review will remain mired in uncertainty, apparently more influenced by the particular panel's composition than by adherence to a common principle.

While the Supreme Court denied certiorari in *Lips*, the Court may become more receptive if the issue continues to arise, particularly if federal district judges continue to express uncertainty concerning the proper scope of review. The possibility of obtaining either en banc consideration or certiorari to resolve the issue may be highest in a death penalty case,<sup>111</sup> where the consequences of refusing to even consider a potentially meritorious issue can be so great.<sup>112</sup>

3. *The Scope of Federal Habeas Review of State Cases.*-- Even the comparatively liberal *Khan* balancing approach to the *Calley/Dodson* criteria is drastically narrower than the standard federal courts use when collaterally reviewing state convictions. Despite several Rehnquist Court opinions constricting habeas,<sup>113</sup> claims of constitutional error continue to receive *de novo* review.<sup>114</sup> During its 1992 Term, the Court specifically declined to limit habeas review of *Miranda*<sup>115</sup> issues to a determination of whether the state court provided a full and fair opportunity to litigate the claim.<sup>116</sup> Application of the search and seizure exclusionary rule remains the only legal issue reviewed under the "full and fair" standard.<sup>117</sup>

In contrast to the *de novo* standard of review for legal questions, federal habeas courts generally must presume that the state courts' factual findings are correct.<sup>118</sup> The Supreme Court recently declined to resolve the proper standard for federal habeas courts' review of state courts' decisions regarding mixed questions of law and fact.<sup>119</sup> This leaves in place the Tenth Circuit's rule that "mixed questions of law and fact," like pure legal questions, are "reviewed *de novo*."<sup>120</sup> Thus, many claims that would succeed upon federal habeas review of a state conviction would be rejected under either the *Khan* or *Lips* test for reviewing courts-martial.

*C. An Empirical Assessment of Habeas Review of Courts-Martial*

A survey of the United States District Court for the District of Kansas' military habeas practice demonstrates the effect of the narrow standard for federal habeas review of military cases. In 1992 and 1993, the district court issued opinions in 32 habeas cases where the petitioner challenged a court-martial conviction, sentence, convening authority's action, or direct appeal.<sup>121</sup> *Lips v. Commandant, U.S. Disciplinary Barracks* was the only case in which the court granted relief.<sup>122</sup> As discussed above, the Tenth Circuit Court of Appeals reversed the district court and denied *Lips* any relief.<sup>123</sup> The United States District Court for the District of Kansas exercises habeas jurisdiction over more than 1,300 prisoners confined at the United States Disciplinary Barracks.<sup>124</sup> Yet during a two-year

span, no prisoner within the district court's jurisdiction benefited from habeas review of a court-martial.<sup>125</sup>

Civilian habeas petitioners' success rate is also low. Two empirical studies of federal habeas corpus practice in the 1970s and early 1980s found that the petitioner succeeded in 3 to 4 percent of the cases surveyed.<sup>126</sup> In the wake of recent Supreme Court decisions limiting habeas petitioners' ability to obtain relief,<sup>127</sup> the success rate today may be even lower. Nevertheless, the *de novo* standard of review provides a meaningful opportunity to collaterally attack a state conviction. That standard's effectiveness is clear in the capital arena. In federal habeas review of state death penalty cases, the petitioner had a success rate of "60-75% as of 1982, 70% as of 1983, and 60% as of 1986."<sup>128</sup> While there has been no post-*Furman*<sup>129</sup> federal habeas review of a military death penalty case, the wide gulf between *de novo* review and even the most liberal permutation of the *Burns v. Wilson* full and fair consideration test suggests that condemned servicemembers will not fare as well.

#### *D. Conclusion*

Servicemembers have a right to seek habeas relief from the Article III judiciary. In the Tenth Circuit, however, recent case law has virtually foreclosed a servicemember's opportunity to obtain relief through the exercise of that right. Absent a significant expansion of the scope of review, federal habeas



review will not function as a meaningful safeguard for condemned servicemembers' constitutional rights.

### III. Appointment of Counsel: The Status Quo

*Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.*

*--Judge Walter V. Shaefer<sup>130</sup>*

The scope of review is tremendously important to a condemned servicemember seeking federal habeas relief; it establishes the framework under which the courts will examine all other issues. Yet even more fundamental than the scope of review is the condemned habeas petitioner's ability to obtain counsel. As Judge Shaefer indicated, representation by counsel affects every aspect of the case.<sup>131</sup> Counsel may even influence the court's choice of which scope of review to apply.

#### A. *The Problem of Indigency*

By the time a military death penalty case reaches federal habeas review, it is extremely unlikely that the petitioner will have sufficient funds to retain counsel. Even those condemned servicemembers with substantial financial resources will likely become impoverished during the lengthy period of direct appeal.<sup>132</sup> The cost of privately retaining a federal habeas counsel would be prohibitive. A 1988 study of 175 attorneys in 25 states found that for a capital case, attorneys spent a median of 665 hours during state postconviction review<sup>133</sup> and 805 hours during federal

habeas review.<sup>134</sup> The first stage of postconviction review alone "consume[s] somewhere between one-fifth and one-fourth" of the average attorney's total yearly hours of practice.<sup>135</sup>

In addition to making it practically impossible for a death row inmate to privately retain counsel, these extensive demands deter attorneys from handling such cases *pro bono*. The United States District Court for the Eastern District of Virginia noted:

In the past, Virginia had no need to take affirmative action to provide counsel to inmates pursuing post-conviction relief. Attorneys volunteered their services or were recruited to provide *pro bono* assistance and representation to death row inmates. Those days are gone. The evidence conclusively establishes that today few--very few--attorneys are willing to voluntarily represent death row inmates in post conviction efforts. One lawyer who did accept such a case testified that he expended in excess of five hundred hours in the preparation and handling of it. He expressed the emotional drain to be such as to preclude his willing acceptance of another such assignment.<sup>136</sup>

While some individual death row inmates may be able to secure representation from volunteer attorneys or public interest organizations, the 2,802 inmates on death row nationwide<sup>137</sup> overtax these resources.<sup>138</sup> In Texas, which relies on volunteer attorneys, "death-sentenced prisoners are not routinely

represented in state post-conviction proceedings."<sup>139</sup> Quite simply, "the demand for lawyers on death row far outstrips the availability of lawyers willing or able to represent condemned inmates."<sup>140</sup> Absent appointed counsel, condemned servicemembers may be unable to obtain legal representation during federal habeas review of their death sentences.

#### *B. The Constitutional Framework*

1. *The Emerging Right to Counsel.*--During this century, constitutional case law concerning a criminal defendant's right to counsel has developed erratically. In its 1930 *Powell v. Alabama*<sup>141</sup> decision, the Supreme Court first recognized a criminal defendant's constitutional right to appointed counsel.<sup>142</sup> This right, however, applied only in capital cases where the defendant was indigent and "incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like."<sup>143</sup> In 1938, the Court held that the Sixth Amendment requires the appointment of counsel for indigent defendants in all federal criminal proceedings.<sup>144</sup> In 1942, however, the Court refused to require the appointment of counsel in state noncapital criminal proceedings.<sup>145</sup>

The Warren Court dramatically expanded the right to counsel. In 1961, the Supreme Court abandoned *Powell's* requirement that capital defendants demonstrate special circumstances to be entitled to appointed counsel; instead, the Court held that all indigent capital defendants have a right to appointed counsel.<sup>146</sup> The right to counsel's most celebrated advance came two years

later, when *Gideon v. Wainwright*<sup>147</sup> held that the Fourteenth Amendment's Due Process Clause applies the Sixth Amendment counsel right to the states, thus giving indigent defendants a constitutional right to appointed counsel in any state felony proceeding.<sup>148</sup> On the same day that it announced *Gideon*, the Court addressed the right to counsel in appellate courts, holding that an indigent defendant has an equal protection right to be represented by counsel during his first appeal as of right.<sup>149</sup>

2. *The Right to Counsel in Postconviction Proceedings.*--By 1974, the Burger Court had fully ascended over the Warren Court's vestiges<sup>150</sup> and the Court held there is no constitutional right to counsel during discretionary appeals before state courts or when seeking a writ of certiorari from the United States Supreme Court.<sup>151</sup> This established a line of demarcation: an indigent criminal defendant had a constitutional right to appointed counsel up to the first appeal as of right, but not thereafter.<sup>152</sup>

The Rehnquist Court reinforced this line of demarcation. In *Pennsylvania v. Finley*,<sup>153</sup> a 1987 opinion authored by Chief Justice Rehnquist, the Court indicated that neither the Fourteenth Amendment's Due Process Clause nor its Equal Protection Clause gives prisoners a right to appointed counsel during state postconviction proceedings.<sup>154</sup> The Court reasoned, "[S]ince a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no right when attacking a

conviction that has long since become final upon exhaustion of the appellate process."<sup>155</sup>

3. *The Right to Counsel in Capital Postconviction Proceedings.*--*Finley* was not a death penalty case,<sup>156</sup> thus raising the question of whether a death row inmate has a constitutional right to postconviction counsel even if an inmate serving a life sentence does not. The case that would resolve that issue is *Murray v. Giarratano*.<sup>157</sup>

Five months before the Supreme Court announced *Finley*, the United States District Court for the Eastern District of Virginia ruled on a class-action suit asserting that Virginia's death row inmates had a constitutional right to assistance of counsel during postconviction proceedings.<sup>158</sup> Rather than resolving the case on the basis of right to counsel case law, the district court relied primarily on *Bounds v. Smith*,<sup>159</sup> where the Supreme Court noted that states must "shoulder affirmative obligations to assure all prisoners meaningful access to the courts."<sup>160</sup> *Bounds* indicated that states could ensure such "meaningful access" by providing inmates with "adequate law libraries or adequate assistance from persons trained in the law."<sup>161</sup> In *Giarratano*, the district court ruled that because death row inmates "are incapable of effectively using lawbooks to raise their claims,"<sup>162</sup> Virginia must appoint counsel for such inmates.<sup>163</sup> However, the district court found that this constitutional right to appointed counsel applied only to state postconviction proceedings; the court ruled that the state need not provide such assistance for

inmates seeking either review by the United States Supreme Court or federal habeas relief.<sup>164</sup>

On appeal, a divided Fourth Circuit panel reversed the portion of the district court's ruling that required Virginia to appoint counsel for death row inmates seeking state postconviction relief.<sup>165</sup> The panel reasoned that Virginia's prison libraries, as well as the availability of attorneys to advise prisoners in preparing post-conviction petitions<sup>166</sup> and a state statute under which counsel were appointed for postconviction petitioners who raise a nonfrivolous claim,<sup>167</sup> satisfied *Bounds*' "meaningful access" requirement.<sup>168</sup> The panel's majority also rejected the notion that there is a "separate panoply of additional constitutional standards only applicable to collateral challenges in death penalty cases."<sup>169</sup>

The Fourth Circuit Court of Appeals ordered a rehearing en banc and, in a 6-to-4 ruling, affirmed the district court.<sup>170</sup> Unlike the panel decision, the en banc opinion found *Pennsylvania v. Finley* inapposite because it did not involve the *Bounds* requirement of meaningful access to courts.<sup>171</sup> "Most significantly," the opinion continued, "Finley did not involve the death penalty."<sup>172</sup> The court reasoned that "[b]ecause of the peculiar nature of the death penalty, we find it difficult to envision any situation in which appointed counsel would not be required in state post-conviction proceedings when a prisoner under the sentence of death could not afford an attorney."<sup>173</sup>

The Supreme Court granted the state's certiorari petition<sup>174</sup> and reversed the Fourth Circuit's en banc ruling.<sup>175</sup> In an opinion written by Chief Justice Rehnquist, who had also authored *Finley*, a four-Justice plurality rejected the proposition that death row inmates are constitutionally entitled to heightened postconviction procedural protections. While recognizing "that the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death,"<sup>176</sup> the Court found that these constraints were unnecessary during collateral review.<sup>177</sup> Therefore, the plurality concluded, "*Finley* applies to those inmates under sentence of death as well as to other inmates, and that holding necessarily imposes limits on *Bounds*."<sup>178</sup>

Justice O'Connor joined in the plurality opinion and in Justice Kennedy's separate concurrence, as well as authoring her own concurring opinion that emphasized legislatures' role in determining how to provide inmates with meaningful access to the courts.<sup>179</sup> Justice Kennedy did not join the plurality opinion, but provided the fifth vote for reversing the Fourth Circuit's en banc decision.<sup>180</sup> He posited that "collateral relief proceedings are a central part of the review process for prisoners sentenced to death," and observed that "a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings."<sup>181</sup> He also recognized that "[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful

petitions for collateral relief without the assistance of persons learned in the law."<sup>182</sup> However, he found that *Bounds'* "meaningful access" requirement "can be satisfied in various ways," and that "state legislatures and prison administrators must be given 'wide discretion' to select appropriate solutions."<sup>183</sup> After noting that "Congress has stated its intention to give" habeas review of capital cases "serious consideration," Justice Kennedy concluded:

Unlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area, for we can decide only the case before us. While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief. I am not prepared to say that this scheme violates the Constitution.<sup>184</sup>

Justice Stevens authored a dissenting opinion that Justices Brennan, Marshall, and Blackmun joined.<sup>185</sup> The dissent concluded that "even if it is permissible to leave an ordinary prisoner to his own resources in collateral proceedings, it is fundamentally unfair to require an indigent death row inmate to initiate collateral review without counsel's guiding hand."<sup>186</sup>



While six Justices agreed that it is at least "unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law,"<sup>187</sup> five Justices agreed that an actual appointment of counsel to represent the death row inmates was not constitutionally required.

A report of the American Bar Association's Criminal Justice Section emphasized that the *Giarratano* plurality's view of the right to counsel "is not a holding of the Court."<sup>188</sup> The Court has treated it as if it were. Two years after *Giarratano*, in *Coleman v. Thompson*,<sup>189</sup> a six-justice majority observed that "[t]here is no constitutional right to an attorney in state post-conviction proceedings," and cited *Giarratano* as "applying the rule to capital cases."<sup>190</sup> The *Coleman* majority also noted that "*Finley* and *Giarratano* established that there is no right to counsel in state collateral proceedings."<sup>191</sup>

The *Coleman* majority left open a possibility that, in some cases, a constitutional right to counsel in state postconviction proceedings might exist. "For *Coleman* to prevail," the Court opined, "there must be an exception to the rule in *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction."<sup>192</sup> The Court, however, felt it unnecessary to resolve that issue in *Coleman*.

Under this *dicta*, a confined servicemember may enjoy a constitutional right to counsel to present a claim that could not

have been raised during direct appeal and that falls within the cause and prejudice exception to the waiver rule.<sup>193</sup> Even where such cause for failure to raise an issue during direct review exists,<sup>194</sup> however, the Supreme Court's decision in *Noyd v. Bond*<sup>195</sup> indicates that the federal district court should apply the exhaustion requirement to mandate that the petitioner seek extraordinary relief within the military justice system before turning to the Article III judiciary. While the United States District Court for the District of Kansas has not always followed this rule,<sup>196</sup> unless the government waives the exhaustion requirement<sup>197</sup> no military petitioner's claim should ever arise for the first time before a federal habeas court. Therefore, while *Coleman* may have left open the possibility of a constitutional right to counsel in a small class of collateral proceedings, that right would apply to extraordinary relief litigation within the military justice system rather than to federal habeas corpus proceedings.

4. *The Constitutional Recognition of Habeas Review for those under Federal Custody.*--The Supreme Court's opinions in *Finley*, *Giarratano*, and *Coleman* all deal with the right to counsel in state post-conviction proceedings.<sup>198</sup> Case law from the federal courts of appeals has rejected a constitutional right to counsel during federal habeas proceedings as well.<sup>199</sup> This conclusion finds support in Supreme Court *dicta*. In *McCleskey v. Zant*,<sup>200</sup> the Court noted that "[a]pplication of the cause and prejudice standard in the abuse of the writ context does

not . . . imply that there is a constitutional right to counsel in federal habeas corpus"<sup>201</sup> and repeated that "the right to appointed counsel extends to the first appeal of right, and no further."<sup>202</sup>

Those cases, however, are distinguishable from a federal habeas corpus action challenging federal proceedings, including courts-martial. In addition to holding that state postconviction proceedings are not constitutionally required,<sup>203</sup> the Supreme Court has held that the Constitution does not mandate federal habeas corpus review of state criminal proceedings at all.<sup>204</sup> Habeas review of federal proceedings, on the other hand, receives constitutional recognition from the Suspension Clause, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>205</sup> The Supreme Court has recognized that this Clause provides constitutional protection to habeas corpus review of military tribunals.<sup>206</sup>

In rejecting the asserted constitutional right to appointed counsel, both the *Finley* majority<sup>207</sup> and the *Giarratano* plurality<sup>208</sup> relied upon the lack of a constitutional requirement for state postconviction proceedings. Justice O'Connor's *Giarratano* concurring opinion also emphasized that "[n]othing in the Constitution requires the States to provide such proceedings."<sup>209</sup> Because the Suspension Clause implicitly requires habeas corpus review of federal convictions, that portion of the *Finley* and *Giarratano* plurality rationale is

inapposite to a servicemember seeking habeas relief. A confined servicemember, therefore, has a stronger argument for a constitutional right to counsel than did Finley and a servicemember on death row has a stronger argument than did Giarratano. The *Giarratano* plurality's conclusion that the Eighth Amendment does not require heightened protections during collateral review of death penalty cases<sup>210</sup> did not carry a majority of the Justices; in fact, Justice Kennedy's separate concurrence appears to conflict with that conclusion.<sup>211</sup> Accordingly, a military capital habeas petitioner can advance an unresolved constitutional argument supporting the appointment of counsel.

While not considering the Suspension Clause, the Seventh Circuit Court of Appeals recently rejected a constitutional right to counsel during collateral review of federal convictions.<sup>212</sup> Holding that there is no constitutional right to counsel when a federal inmate attacks his sentence under 28 U.S.C. § 2255, the court reasoned that a § 2255 action "is not part of the original criminal proceeding; it is an independent civil suit. Because it is civil in nature, a petitioner under § 2255 does not have a constitutional right to counsel."<sup>213</sup> The court added parenthetically, "There is little doubt that there is no constitutional right to appointed counsel in a civil case."<sup>214</sup>

The court's reasoning, however, is flawed. The Supreme Court has specifically rejected the proposition that the constitutional right to appointed counsel turns on a distinction

between civil and criminal proceedings: "[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the . . . right to appointed counsel even though proceedings may be styled 'civil' and not 'criminal.'" <sup>215</sup> Thus, even apart from questions about whether a postconviction proceeding is properly characterized as a civil matter, <sup>216</sup> the right to appointed counsel cannot be ruled out on this ground alone.

Nevertheless, any attempt to use the Suspension Clause to establish a constitutional right to appointed counsel would likely fall prey to the Supreme Court's oft-repeated *dicta* that "the right to appointed counsel extends to the first appeal of right, and no further." <sup>217</sup> While there is no Supreme Court holding on the right to habeas counsel for a prisoner under federal custody, the handwriting is on the wall.

C. *Statutory Authority for a Right to Appointed Counsel During Federal Habeas Review of Capital Cases*

In the absence of a constitutional right to appointed counsel during habeas review of death penalty cases, the focus turns to statutory protections. While the Uniform Code of Military Justice provides a right to counsel at trial, <sup>218</sup> on appeal, <sup>219</sup> and before the Supreme Court, <sup>220</sup> the Code is silent on the question of counsel during habeas review by Article III courts. Because there is no military-specific statutory right to

counsel, the condemned servicemember must look for such a right in statutes of general applicability.

1. *The Anti-Drug Abuse Act of 1988.*--Nine days before the Supreme Court granted certiorari in *Murray v. Giaratano*, Congress passed a statute that included a right to counsel during federal habeas corpus review of capital cases.<sup>221</sup> In addition to authorizing the death penalty for certain drug-related murders,<sup>222</sup> the Anti-Drug Abuse Act of 1988 provides:

[(q)](4)(A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either--

(i) before judgment; or

(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of other services in accordance with [specified requirements concerning the attorneys' experience and procedures for obtaining expert assistance].

[(q)(4)](B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially

unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with [specified requirements concerning the attorneys' experience and procedures for obtaining expert assistance].<sup>223</sup>

Counsel appointed under this provision are specifically exempted from the normal maximum compensation rates and limits on expert and investigative assistance; appointing courts have discretion to set appropriate fees.<sup>224</sup> The Judicial Conference has recommended that attorneys appointed under this provision receive an hourly rate between \$75 and \$125.<sup>225</sup> The Anti-Drug Abuse Act also sets minimum qualifications for appointed counsel.<sup>226</sup>

Subsection 484(q)(4)(B) of the Anti-Drug Abuse Act, which applies to collateral review under 28 U.S.C. §§ 2254 and 2255, does not establish a right to appointed counsel for a condemned servicemember seeking federal habeas review. Section 2254 of title 28 authorizes federal courts to issue writs of habeas corpus to prisoners under state convictions. A petitioner confined as a result of a military death sentence clearly does not fall under that provision.

Section 2255 of title 28 establishes the right to a federal post-conviction proceeding for prisoners sentenced by "a court established by Act of Congress."<sup>227</sup> Federal prisoners seek post-conviction relief under this provision "in lieu of a petition for

the writ of habeas corpus."<sup>228</sup> If a court-martial is "a court established by Act of Congress," as *dicta* in one Court of Military Appeals decision indicates,<sup>229</sup> then this section would appear to provide a military prisoner with a potential postconviction remedy. Such an appearance, however, would be deceiving. Postconviction proceedings under 28 U.S.C. § 2255 are brought in "the court which imposed the sentence."<sup>230</sup> Thus, the section would not provide a convicted servicemember with a vehicle for attacking his case in a federal district court. Nor would this section actually enable a servicemember to launch a collateral attack at the court-martial level because "no proceeding in revision may be held when any part of the sentence has been ordered executed."<sup>231</sup> A condemned servicemember cannot rely on subsection 848(q)(4)(B) of the Anti-Drug Abuse Act.

What of subsection 848(q)(4)(A), which mandates the appointment of counsel for indigent defendants "in every criminal action in which a defendant is charged with a crime which may be punishable by death"? This provision is enigmatic.<sup>232</sup> It could be read broadly to apply to every federal, state, and military capital prosecution, or it could be read narrowly to apply to only those death penalty offenses created by the Anti-Drug Abuse Act of which it is a part.

Resolving the subsection's ambiguity is difficult because the Anti-Drug Abuse Act's counsel provisions have scant legislative history. "No Senate or House Report was submitted with" the Act.<sup>233</sup> The subsection's entire legislative history



consists of one brief debate in the House of Representatives. Representative Conyers (D-Mich) proposed what would become subsection 848(q)(4)(A) as an amendment to H.R. 5210, which would become the Anti-Drug Abuse Act of 1988.<sup>234</sup> He and Representative Gekas (R-Pa.) discussed the proposal on the House floor, but their remarks were focused on the counsel qualification provision and the "good cause" exception to those qualifications.<sup>235</sup> The House then adopted Representative Conyers' amendment without further discussion.<sup>236</sup> The Representatives' comments shed no light on Congress' view of subsection 848(q)(4)(A)'s breadth.

In addition to a lack of legislative history, "there is a paucity of cases concerning application of this statute."<sup>237</sup> Only one published opinion has addressed subsection 848(q)(4)(A)'s limits.<sup>238</sup> In *Wainwright v. Norris*,<sup>239</sup> two lawyers represented an Arkansas death row inmate in a state postconviction proceeding. After the Arkansas Supreme Court denied their motion for attorney fees, the lawyers filed a habeas corpus petition with the United States District Court for the Eastern District of Arkansas. The lawyers petitioned the court for attorney fees resulting from both the federal habeas proceeding and the state postconviction proceeding. The district court reviewed the Anti-Drug Abuse Act's counsel appointment provisions and noted:

Paragraph (4)(a) does not limit itself to potential capital cases arising under federal law, but instead broadly declares itself applicable to "every criminal action arising in which a defendant is charged with a

crime which may be punishable by death ..."

"(n)otwithstanding any other provision of law to the contrary." This would seem on its face to apply to state capital cases as well as federal. However, the provisions for appointment of counsel were enacted as part of a new statute providing for the death penalty under federal law and it seems clear that Congress intended the quoted language to apply to federal capital crimes. Issues of federalism would prevent Congress from regulating state procedures by enacting a federal statute and this Court does not believe that Congress intended to so attempt here.<sup>240</sup>

Similarly, the Administrative Office of the U.S. Courts has rejected a broad reading of subsection 848(q)(4)(A) of the Anti-Drug Act, concluding that the subsection authorizes compensation from Criminal Justice Act funds for "representation provided only in connection with proceedings in Federal court."<sup>241</sup>

The federalism concerns in *Norris* would be inapplicable in the military justice context--indeed, Congress has express constitutional authority over the military justice system.<sup>242</sup> Nevertheless, both the district court's and the Administrative Office of U.S. Courts' interpretations of subsection 848(q)(4)(A) are inconsistent with the broad reading that would be necessary to establish that the statute applies to condemned servicemembers.

A familiar rule of statutory construction lends additional support to the narrow interpretation of subsection 848(q)(4)(A). The Supreme Court has expressed "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment."<sup>243</sup> If subsection 848(q)(4)(A) were construed to apply to all death penalty cases, including state cases, then it would entirely subsume subsection 848(q)(4)(B). Both of the procedures described in subsection (q)(4)(B), habeas petitions under 28 U.S.C. § 2254 and postconviction proceedings under 28 U.S.C. § 2255, would be included in subsection (q)(4)(A)(ii)'s provision for counsel "after the entry of a judgment imposing a sentence of death but before the execution of that judgment." On the other hand, under the *Norris* construction, the two subsections overlap somewhat<sup>244</sup> but not entirely; neither provision is wholly superfluous. Thus, the *Norris* construction is preferable to the broader construction.

While the issue certainly is not free from doubt, federal courts are unlikely to hold that the Anti-Drug Abuse Act created a statutory right to counsel during federal habeas review of a military death sentence. The Act's sparse legislative history provides no suggestion of why Congress would have denied the Act's protections to military death row inmates. The most likely explanation is that the provision's drafters either overlooked the military death penalty's existence or were unaware of the statutory mechanism by which military death row inmates seek

federal habeas corpus review. Regardless of the reason for this statutory lacuna, the indigent military death row inmate must look elsewhere for a right to appointed counsel during federal habeas review.

2. *The Criminal Justice Act.*--Before Congress adopted the Anti-Drug Act of 1988, the Criminal Justice Act was the main vehicle for appointment of federal habeas counsel.<sup>245</sup> Unlike the Anti-Drug Abuse Act, the Criminal Justice Act specifically authorizes appointment of counsel for indigent petitioners "seeking relief under [28 U.S.C.] section 2241,"<sup>246</sup> thus covering incarcerated servicemembers. Such appointment, however, is discretionary; the Act provides for appointment upon a determination "that the interests of justice so require."<sup>247</sup> "[E]ven for a death row inmate," appointment "is not mandatory or automatic."<sup>248</sup>

Courts are required to appoint counsel for indigent habeas petitioners in two situations: (1) "If necessary for effective utilization of discovery procedures;"<sup>249</sup> or (2) "If an evidentiary hearing is required . . . ."<sup>250</sup> Like subsection 848(q)(4)(B) of the Anti-Drug Abuse Act, however, these congressionally-enacted requirements apply only to actions under 28 U.S.C. §§ 2254 and 2255; in proceedings under 28 U.S.C. § 2241, the requirements "may be applied at the discretion of the United States district court."<sup>251</sup>

Before the Anti-Drug Abuse Act mandated appointment of counsel in federal habeas review of state death penalty cases,

courts generally "endorsed the appointment of counsel to represent indigent" state death row inmates.<sup>252</sup> Federal district courts did, however, sometimes decline to appoint counsel for death row inmates seeking habeas relief.<sup>253</sup>

The Criminal Justice Act includes provisions governing appointed counsel's compensation and reimbursement of expenses.<sup>254</sup> The compensation level, however, is quite low. The Act's current maximum hourly remuneration rate is \$60 for in-court time and \$40 for out-of-court time, though the Judicial Conference can set a higher hourly rate of up to \$75 for a particular district or circuit.<sup>255</sup>

The Act also establishes a cap on the total amount that can be paid to an appointed counsel. Courts, however, have differed over whether habeas cases are governed by the cap for "representation of a defendant before the United States . . . district court"<sup>256</sup> (currently \$3,500 per attorney per case)<sup>257</sup> or the cap for "any other representation required or authorized by" the Criminal Justice Act (currently \$750 per proceeding).<sup>258</sup> The more widely followed view is that the \$750 rate applies to habeas corpus proceedings. Regardless of which maximum amount is correct, the cap can be waived "for extended or complex representation."<sup>259</sup> Such a waiver requires the court's certification "that the amount of the excess payment is necessary to provide fair compensation."<sup>260</sup> The waiver must also receive approval from the chief judge of the circuit.<sup>261</sup>

Because Kansas has yet to enact a post-*Furman* death penalty,<sup>262</sup> there is no recent case law concerning the federal district court's appointment of counsel for death row inmates seeking habeas review. The district court has, however, considered requests for appointment of counsel from servicemembers in non-capital habeas cases. From 1991 through 1993, five servicemembers requested appointment of counsel to represent them during federal habeas proceedings.<sup>263</sup> The court denied all five requests.<sup>264</sup> During that three-year span, only one military habeas petitioner was represented by counsel before the federal district court;<sup>265</sup> the remainder proceeded without counsel. While federal district courts have sometimes appointed counsel for servicemembers during habeas review of courts-martial,<sup>266</sup> the norm in the District of Kansas is *pro se* representation. It remains to be seen whether the court will exercise its discretion to break from this norm in capital cases.

#### D. Conclusion

A military death row inmate has no right to the appointment of counsel during federal habeas review. While the federal district court can appoint counsel under the Criminal Justice Act, the court has the discretion to decline to make such an appointment. A district court has no authority to appoint counsel for military petitioners under the Anti-Drug Abuse Act, whose provisions are more beneficial to the petitioner than those of the Criminal Justice Act.

IV. Should Habeas Counsel Be Appointed for Military Death Row Inmates?

*It is essential to remember that counsel is appointed to ensure the preservation of the defendant's constitutional rights and to make certain that unlawful executions do not occur.*

*--United States Court of Appeals  
for the Eighth Circuit<sup>267</sup>*

This section considers whether, as a matter of policy,<sup>268</sup> the government should give military death row inmates a right to appointed counsel during federal habeas corpus proceedings. The crux of the policy question is whether the government will always appoint counsel for indigent military habeas petitioners or sometimes force them to proceed *pro se*.

A. *Factors Supporting a Right to Appointed Counsel*

1. *Equity.*--As discussed above, the Anti-Drug Abuse Act provided all state and federal death row inmates with a right to appointed counsel when collaterally attacking their death sentences in federal court. Thus, Congress made a determination that all capital habeas petitioners should be protected by legal representation. The Act, however, failed to extend the right of representation to military death row inmates. No principled basis exists for denying condemned servicemembers this protection. In the absence of any justification for the distinction, servicemembers should not be relegated to the status of second-class litigants.

Practitioners laud the military justice system for providing a right to counsel superior to that enjoyed by civilian criminal defendants.<sup>269</sup> One commentary noted, "The right to counsel afforded service members is far broader than that afforded most civilians, as all members of the armed forces have a right to free military counsel, regardless of indigency--or lack thereof."<sup>270</sup> It would be ironic, indeed, for the government to provide counsel to a non-indigent accused at a special court-martial while failing to provide habeas counsel to an indigent servicemember on death row.<sup>271</sup>

2. *Ensuring Accuracy of the Death Sentence.*--A second factor supporting a right to appointed counsel is that it promotes the very purpose of habeas review: "Courts appoint lawyers to serve these prisoners to assure that no condemned person shall die by reason of an unconstitutional process."<sup>272</sup> Appointed counsel is vitally important to meaningful habeas review. Without counsel, "*pro se* litigants simply cannot manage" the broad "range of complex investigative, legal research, and litigation tasks" that capital federal habeas cases require.<sup>273</sup>

Two empirical studies verify what common sense would suggest: habeas claims litigated by lawyers are more successful than habeas claims litigated by petitioners *pro se*. The Department of Justice conducted a study of approximately one-eighth of all habeas corpus petitions filed nationwide from 1975 to 1977. This study found that "only 3.2% of the petitions resulted in any relief."<sup>274</sup> But petitioners represented by



counsel fared markedly better than the average. "Petitioners represented by counsel were successful in 13.7% of their cases while the success rate for persons filing pro se was 0.9%." <sup>275</sup> The study's author concluded, "Counsel considerably enhances the probability of success." <sup>276</sup>

Another group of researchers conducted an in-depth empirical study of the habeas practice in one federal district court and similarly found that "prisoners' chances of success" increase when they are represented by counsel. <sup>277</sup> The discrepancy in results would likely be even greater in the capital arena; as Justice Kennedy succinctly stated, "The complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." <sup>278</sup>

These findings suggest that *pro se* habeas petitioners are unable to prevail in some circumstances where a lawyer acting on their behalf would. In the death penalty context, this means that the petitioner might be executed due solely to lack of counsel. The benefit of counsel to the petitioner is obvious, but society benefits as well. Counsel will help to vindicate society's "compelling interest[] in the enforcement of constitutional guarantees." <sup>279</sup>

Even more importantly, habeas counsel sometimes demonstrate that their clients are factually innocent. <sup>280</sup> In these cases, counsel spares society the horror of executing an innocent

person. As Professor Mello argues, "A second look is not a guarantee of absolute truth, nor is a seventh look. Redundancy, however, increases the probability that the ultimate result will be more accurate [p]rovided that the post-conviction process is not an arid ritual of pathetic *pro se* claims . . . ." <sup>281</sup>

3. *The Lack of Qualification Standards for Military Defense Counsel in Death Penalty Cases.*--Such redundancy is particularly important when reviewing military death penalty cases because the postconviction counsel may be far more expert in death penalty matters than were either the trial or appellate defense counsel. The Chairman of the House Subcommittee on Civil and Constitutional Rights, Representative Don Edwards (D-Cal.), recently registered his concern that military defense counsel in death penalty cases need not meet the Anti-Drug Act's qualification standards, that no procedures are in place to ensure continuity of counsel in death penalty cases, and that the military justice system may have failed to provide the defense with sufficient expert and investigative assistance in capital cases. <sup>282</sup> An experienced postconviction counsel could evaluate whether any of these perceived shortcomings adversely affected the condemned servicemember.

4. *The Heightened Importance of the First Federal Habeas Petition.*--In *McCleskey v. Zant*, <sup>283</sup> the Supreme Court held that ordinarily, federal courts will review a second or subsequent federal habeas petition only if the petitioner shows cause for failing to raise the claim earlier and prejudice from the court's

failure to consider the new claim. Under this rule, a poorly prepared *pro se* petition may permanently foreclose a death row inmate from raising meritorious issues.<sup>284</sup> Providing the death row inmate with counsel would increase the likelihood that the first petition raises all possible issues, thus reducing the chance of forfeiting a legitimate constitutional claim.

*B. The Countervailing Concern*

The only apparent countervailing concern is cost. In order to provide counsel, the government must either pay an appointed attorney or divert a government-employed attorney from other tasks. Viewed in context, however, the added cost of military death penalty cases will be infinitesimal. In 1992, there were more than 80,000 representations under the Criminal Justice Act.<sup>285</sup> While there has been a Criminal Justice Act funding problem in each of the last three fiscal years,<sup>286</sup> a trickle of military death penalty cases would not add an appreciable--or even noticeable--financial burden. Even if all eight military death penalty cases were to go into federal habeas review at once, they would amount to less than one one-hundredth of a percent increase in the Criminal Justice Act workload.

Additional delay does not appear to be a countervailing factor. In fact, the Department of Justice's habeas corpus study indicated that appointing counsel to represent a petitioner resulted in the case being resolved more quickly.<sup>287</sup>

### C. Conclusion

Appointed counsel in habeas review of capital courts-martial would promote accuracy in the death penalty's imposition. Compared to this compelling interest, there is only a minute increase in cost. Accordingly, condemned servicemembers should have a right to appointed counsel during federal habeas review.

### V. Providing Counsel

*Just as soldiers who are asked to lay down their lives in battle deserve the very best training, weapons, and support, those facing the death penalty deserve no less than the very best quality of representation available under our legal system.*

*--United States Army Court of Military Review<sup>288</sup>*

The conclusion that condemned servicemembers should receive counsel during federal habeas review begs the question of how to provide such representation. The American Bar Association has recommended that "[t]o avoid the delay occasioned by the appointment of new counsel for post-conviction proceedings and to assure continued competent representation, state appellate counsel who represented a death-sentenced inmate should continue representation through all subsequent state, federal, and United States Supreme Court proceedings."<sup>289</sup> By analogy, this would suggest that military appellate defense counsel should represent the condemned servicemember during federal habeas review.

### A. Military Counsel

The Uniform Code of Military Justice would allow appellate defense counsel to continue representing a servicemember whose case is before a federal district court under 28 U.S.C. § 2241. Article 70 provides, in part, "Military appellate counsel shall also perform such other functions in connection with the review of court-martial cases as the Judge Advocate General directs."<sup>290</sup> Because of this specific statutory provision, a military counsel detailed to represent a habeas petitioner could do so without violating 18 U.S.C. § 205,<sup>291</sup> which precludes government officers and employees from acting as an attorney to prosecute a claim against the United States "other than in the proper discharge of official duties."<sup>292</sup>

The Army's military justice regulation<sup>293</sup> provides "Attorney-Client Guidelines"<sup>294</sup> that discuss "[c]ollateral civil court proceedings."<sup>295</sup> The guidelines state a general rule that "[m]ilitary defense counsel's ability to act in such matters is regulated by Army Policy in AR 27-40,"<sup>296</sup> the litigation regulation. The military justice regulation continues, "The military defense counsel is not required to prepare a habeas corpus petition pursuant to 28 USC 2242 and is prohibited from doing so unless the provisions of AR 27-40 are followed. However, nothing prohibits the military counsel from explaining a *pro se* petition to the accused."<sup>297</sup>

AR 27-40, in turn, provides that as a general rule, "military personnel on active duty and DA civilian personnel are

prohibited from appearing as counsel before any civilian court in litigation in which the United States has an interest, without the prior written approval of TJAG."<sup>298</sup>

Precedent exists for assigning military counsel to assist in post-appellate representation of a condemned servicemember. After the Tenth Circuit Court of Appeals dismissed PFC Bennett's appeal of his second unsuccessful habeas petition,<sup>299</sup> his civilian defense counsel wrote to the Judge Advocate General of the Army:

I feel that I am in need of Military Defense to aid in the defense of John A. Bennett. I expect to be heard on a Clemency Petition in the very near future and need and desire aid of Military Defense Counsel, someone who is familiar with the defense of military personnel and who has had more experience in this field than I have had.

I respectfully request your office to appoint such person or persons to work in this man's behalf.<sup>300</sup>

In a memorandum for record, Major General Decker noted that after discussing the request with the Under Secretary of the Army, he made an appellate defense counsel "available to Mr. Williams without delay."<sup>301</sup> Thus, there is historical support for expanding appellate defense counsel's role in death penalty cases.

Although assigning appellate defense counsel to federal habeas review duties is clearly permissible, it is also problematic. The American Bar Association's recommendation

calling for state appellate counsel to continue representation during postconviction review was motivated by a desire for continuity of counsel.<sup>302</sup> Unless the services alter their assignment processes dramatically, however, such continuity of counsel would not result from having appellate defense counsel represent condemned servicemembers on habeas review. Chief Judge Everett has warned:

Even during the appellate process the counsel who were representing the accuseds may leave the service or be reassigned, in which event the lawyers who prepare the supplements to the petitions for review<sup>303</sup> may not be the same lawyers who previously represented the accuseds at the court of military review. Due to the lack of continuity, a risk exists that the appellate defense counsel who submit the supplements in the Court of Military Appeals may, because of lack of familiarity with the earlier proceedings, overlook significant issues of law that should be raised.<sup>304</sup>

This lack of continuity infects capital appeals as well. The Court of Military Appeals recently issued an order dripping with implied criticism of the lead appellate defense counsel in a capital case who moved to withdraw in the midst of the defense briefing schedule.<sup>305</sup> The order noted that the counsel had actually transferred from the Army Defense Appellate Division 16 days before he moved for leave to withdraw from the case.<sup>306</sup> What is most disturbing about this case is that counsel's apparent

nonchalance concerning withdrawal and substitution of a new lead counsel is the rule rather than the exception. In *United States v. Curtis*, another death penalty case, seven different appellate counsel have entered appearances in and then withdrawn from the case due to reassignment or end of active service.<sup>307</sup>

The Chairman of the Court of Military Appeals' Rules Advisory Committee, Eugene Fidell, has noted "the continuing problem of personnel turbulence in the appellate divisions of the Offices of the Judge Advocates General."<sup>308</sup> Such personnel turbulence creates a culture of insensitivity to continuity concerns. In a letter to the Secretary of Defense, Representative Edwards called attention to the lack of procedures to ensure continuity of counsel in military death penalty cases.<sup>309</sup> While the military certainly could manage its attorneys differently to promote continuity, major reforms would be necessary for the appellate defense divisions to produce the kind of continuity that the American Bar Association's recommendations seek to achieve.

The American Bar Association's concern for continuity centered on ensuring a thorough knowledge of the record.<sup>310</sup> The military appellate defense divisions' lack of continuity would have an effect far worse than unfamiliarity with the record: counsel may be entirely unfamiliar with the postconviction process. Capital habeas cases will likely arise so infrequently that none of the four autonomous appellate defense divisions will develop any expertise--or even retain any institutional memory--



concerning such litigation. The American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases recommends that counsel in a capital postconviction case have "prior experience as postconviction counsel in at least three cases in state or federal court."<sup>311</sup> Due to the general ban on representing servicemembers in habeas cases, however, military lawyers will not be experienced in habeas defense work. As Judge Godbold has quipped, "the average trial lawyer, no matter what his or her expertise, doesn't know any more about habeas than he does about atomic energy."<sup>312</sup> A capital habeas case is an inappropriate place for on-the-job training.<sup>313</sup>

Military appellate defense counsel are not the optimal solution for providing condemned servicemembers with habeas counsel. Nevertheless, to the condemned servicemember even an inexperienced counsel is better than no counsel.<sup>314</sup> Thus, once a military death penalty case moves into federal habeas proceedings, the relevant Judge Advocate General should monitor the case closely. If the petitioner cannot obtain counsel by other means, the Judge Advocate General should act under Article 70(e) to appoint military appellate defense counsel to represent the petitioner.

#### *B. The Criminal Justice Act*

The United States District Court for the District of Kansas also has the power to appoint counsel for military capital habeas petitioners. The Criminal Justice Act provides that each federal

district court, with the approval of the circuit's judicial council, shall adopt a plan for providing representation for those unable to obtain adequate representation in specified criminal matters.<sup>315</sup> Where a court determines that "the interests of justice so require, representation may be provided for any financially eligible person who . . . is seeking relief under section 2241, 2254, or 2255 of title 28."<sup>316</sup>

The plan for the Kansas federal district court provides that judges may choose to provide representation through either the district's federal public defender organization<sup>317</sup> or the district's CJA Panel, which consists of private attorneys "who are eligible and willing to be appointed to provide representation under the Criminal Justice Act."<sup>318</sup> Not surprisingly, in light of the fact that Kansas has yet to enact a post-*Furman* death penalty,<sup>319</sup> the district's plan does not have any provisions concerning appointment in death penalty cases. Nor does the plan make any provision for military habeas cases beyond a general statement that the plan applies to "any person . . . [w]ho is seeking collateral relief, as provided in subsection (b) of the Act."<sup>320</sup>

While the plan as it currently exists would authorize a judge to appoint counsel in a military death penalty case, nothing in the plan requires such appointment. The Criminal Justice Act authorizes district courts to "modify the plan at any time with the approval of the judicial council of the circuit."<sup>321</sup> The district court should modify its plan to expressly state,

"Representation shall be provided for any financially eligible person proceeding under 28 U.S.C. § 2241 seeking to vacate or set aside a death sentence imposed by a court-martial."

The district court's Criminal Justice Act plan provides that "[a]ttorneys who serve on the CJA panel must be members in good standing of the federal bar of this district."<sup>322</sup> To be admitted to the court's bar, an attorney must be a member of the Kansas state bar.<sup>323</sup> For purposes of appointment to a military death penalty habeas case, this rule is too restrictive. There is simply no nexus between admission to the Kansas bar and effective representation before the federal district court in a military habeas case. The ideal counsel would be one familiar with state death penalty postconviction proceedings, federal habeas review of capital cases, and the military justice system.<sup>324</sup>

Despite the requirement that CJA Panel attorneys be members of the court's bar, the plan also provides, "Nothing in this rule is intended to impinge upon the authority of a presiding judge . . . to appoint an attorney who is not next in sequence [on the CJA Panel roster] or who is not a member of the CJA Panel, in appropriate cases, to insure adequate representation."<sup>325</sup> This rule would allow the judge to appoint an attorney who is not a member of the court's bar to represent a military capital habeas petitioner *pro hac vice*.<sup>326</sup> While Kansas does not have a death penalty resource center,<sup>327</sup> the judge should consult with the Federal Death Penalty Resource Counsel Project<sup>328</sup> to assist in identifying the best counsel to appoint.

It may, however, be difficult to find a counsel willing to accept the case. While the cap on total compensation can be waived for complex litigation such as a capital habeas case, the maximum hourly rates of \$60 for in-court time and \$40 for out-of-court time remains in effect. While the district could apply to the Judicial Conference of the United States for a \$75 hourly rate for counsel handling military capital cases, even that level of funding might be insufficient to attract qualified counsel. Before the Anti-Drug Abuse Act eliminated the Criminal Justice Act's hourly-rate provisions for habeas review of state capital cases, the United States District Court of the Northern District of Georgia found that "it has become increasingly difficult to find counsel willing to take appointments in death penalty cases."<sup>329</sup> The Administrative Office of U.S. Courts has similarly warned:

Compensation for attorneys under the Criminal Justice Act has been, and remains, substantially below prevailing market rates. In many locations it does not even cover basic office overhead costs. Many lawyers have declined appointments or resigned as panel attorneys due to the economic pressure associated with the rates of compensation authorized under the Criminal Justice Act.<sup>330</sup>

An alternative available to the judge is to appoint the Federal Public Defender Organization to represent the petitioner. Despite the fact that Kansas does not yet have a death penalty,

that organization will likely be familiar with death penalty issues because of the federal death penalty that the Anti-Drug Abuse Act itself established.<sup>331</sup> On the other hand, that organization almost surely would not have the mix of military justice and death penalty experience that the optimal counsel would have. Thus, the Criminal Justice Act's "bargain-basement rates"<sup>332</sup> may significantly reduce the quality of counsel available to a military habeas petitioner.

### *C. The Anti-Drug Abuse Act*

The Anti-Drug Abuse Act provides capital habeas petitioners with significant benefits compared to the Criminal Justice Act's provisions. In addition to making appointment mandatory in death penalty cases, the Anti-Drug Abuse Act authorizes compensation as is "reasonably necessary" to ensure competent representation.<sup>333</sup> The Criminal Justice Act, on the other hand, imposes a \$750 cap unless the counsel goes through a two-step waiver process. The Anti-Drug Abuse Act also waives the Criminal Justice Act's cap on fees for non-legal services and maximum hourly rate.<sup>334</sup>

The Anti-Drug Abuse Act guarantees continuity of counsel, or replacement by a similarly qualified counsel, through "every subsequent stage of available judicial proceedings," post-conviction proceedings, and applications for clemency.<sup>335</sup> The Criminal Justice Act has no similar provision.

Another difference between the Anti-Drug Abuse Act and the Criminal Justice Act is the former's inclusion of minimum qualifications for appointed counsel.<sup>336</sup> The qualification

standards, however, provide no real benefit to a death row inmate seeking habeas relief. Under the standards, "[i]f the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases."<sup>337</sup> "[F]or good cause," the court may instead appoint "another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant . . . ."<sup>338</sup>

These standards are poorly tailored for habeas counsel. The Supreme Court has "consistently recognized that habeas corpus proceedings are civil in nature,"<sup>339</sup> and the Federal Rules of Civil Procedure govern habeas corpus proceedings.<sup>340</sup> Experience as a criminal appellate counsel does little to ensure that lawyers appointed to handle federal habeas reviews are proficient in such litigation. The American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases provide that postconviction counsel should be a "*trial* practitioner[]" with experienced in litigating "serious and complex" cases.<sup>341</sup> The Anti-Drug Act's qualification standards do not differentiate between appellate and post-conviction counsel; rather, the Act includes one standard for all counsel appointed after judgment.<sup>342</sup> This failure to differentiate between two very different functions produces a qualification standard unsuited to the appointment of habeas counsel.

Even without a meaningful qualification standard for postconviction counsel, however, the Anti-Drug Abuse Act of 1988 provides capital habeas petitioners with far greater protections than does the Criminal Justice Act. The only death row inmates in the country who do not receive the Anti-Drug Abuse Act's benefits are those at the United States Disciplinary Barracks.

The optimal solution to providing counsel for military death row habeas petitioners would be to bring them under the appointment system established by the Anti-Drug Abuse Act. This would require congressional action. Absent new legislation, a court would have no authority to extend the Anti-Drug Abuse Act's more beneficial terms to a military capital habeas petitioner.

#### VI. A Legislative Proposal

*When we assumed the solider, we did not lay aside  
the citizen.*

*--George Washington<sup>343</sup>*

##### A. A Call for Congressional Action

While guaranteeing representation by counsel is a necessary condition for meaningful habeas review of military capital cases, it is not a sufficient condition. Habeas review cannot meaningfully protect condemned servicemembers' constitutional rights absent a wider scope of review. Expanding the scope of review is within the judiciary's power,<sup>344</sup> but the Supreme Court has already rejected one invitation to do so.<sup>345</sup> Rather than waiting for judicial action that may never come, Congress should implement reform.

"Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."<sup>346</sup> Congress should discharge that responsibility by ensuring that Article III courts have the ability to assess and vindicate condemned servicemembers' rights through meaningful habeas review of capital courts-martial. An essential ingredient of such meaningful habeas review is *de novo* review of constitutional issues.

The Supreme Court has noted that implicit within the Uniform Code of Military Justice "is the view that the military court system generally is adequate to and responsibly will perform its assigned task."<sup>347</sup> A more exacting standard of review thus draws the criticism that the heightened scrutiny from federal courts "might well emasculate the role of the military courts in balancing the rights of service members against the needs of the service."<sup>348</sup>

In practice, however, meaningful habeas review of capital cases would not displace the Court of Military Appeals from its proper place atop the military justice system.<sup>349</sup> Regardless of the federal district court's decision upon habeas review of a capital court-martial, the losing party will likely appeal the case. If the Tenth Circuit Court of Appeals rules against the petitioner, then there is no tension between the Court of Military Appeals and the Article III judiciary and no diminution of the Court of Military Appeals' role. If, on the other hand, the Tenth Circuit Court of Appeals disagrees with the Court of



Military Appeals and rules for the petitioner, then the United States can seek certiorari. The Supreme Court would quite likely grant certiorari in such a case, as it would present a split between two federal appellate courts on an issue with literally life or death consequences.<sup>350</sup> Thus, in actuality, expanding the scope of review in death penalty cases would not subordinate the Court of Military Appeals to the Tenth Circuit Court of Appeals. Rather, the two courts would operate in tandem to identify controversial issues for the Supreme Court's resolution.<sup>351</sup>

One additional concern applies to both the proposed broader scope of review and the proposed statutory right to counsel. Once death penalty habeas petitioners receive such protections, servicemembers who are confined as the result of noncapital courts-martial may attempt to win the new procedures' benefits as well. The courts, however, would almost surely rebuff any such attempt.

Any statute affecting habeas review of courts-martial would enjoy the heightened deference the Supreme Court accords to congressional action in military matters.<sup>352</sup> As the Court noted in 1994, "Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'"<sup>353</sup> Additionally, because a system of heightened protection for capital cases advances the governmental interest in ensuring accuracy in the death penalty's imposition, any attempt to rely on the Fifth Amendment's Equal Protection

component<sup>354</sup> to extend such protections into the noncapital arena would fail. In fact, the Court of Military Appeals has rejected an equal protection challenge to two provisions in the Uniform Code of Military Justice that extend added protections during review of death sentences.<sup>355</sup>

Thus, in deciding whether to provide additional protections during federal habeas review of military capital cases, Congress need not fear that it is starting down a slippery slope toward a right to counsel in every federal habeas review of a court-martial and a total abandonment of the full and fair standard.

#### *B. A Legislative Strategy*

Appendix A proposes a bill, the Military Habeas Corpus Equality Act of 1994, designed to provide condemned servicemembers with both a right to counsel and a meaningful scope of review. The bill would apply retroactively to cover military death row inmates who were sentenced prior to the bill's enactment.

Since 1989, attempts to amend habeas corpus have been among the most contentious issues before Congress.<sup>356</sup> A proposal to amend either 28 U.S.C. § 2241 or 21 U.S.C. § 848(q)(4)(b) would likely fall victim to the legislative infighting that characterizes this area. The Military Habeas Corpus Equality Act seeks to escape the habeas gridlock by avoiding a specific scope of review or right to counsel. Rather, the bill merely calls for military capital habeas cases to be treated in the same manner as would a state capital case on federal habeas review. The precise

details are left to the on-going legislative consideration of how state cases should be handled on habeas. The bill thus advances only one principle: equality of treatment for military death row habeas petitioners. Quite simply, the bill would give death row inmates at the United States Disciplinary Barracks the same opportunity to challenge their sentences before the Article III courts that death row inmates at San Quentin or the Virginia State Penitentiary already have.

The principle of equality would likely be far less controversial than precise formulations concerning retroactivity or procedural default have proved to be. A 1982 Senate Armed Services Committee report supported the concept of equality between federal habeas review of military and civilian cases. One crucial development since 1982 makes equality even more important: *Solorio v. United States*.<sup>357</sup> The military justice system can now try servicemembers for any offense under the Uniform Code of Military Justice without regard to whether the alleged offense was connected to military service. A servicemember should not forfeit meaningful access to federal habeas review merely because the military rather than a state exercised jurisdiction over the case--a decision entirely beyond the servicemember's control.

Under current law, the bill would produce a system under which federal courts were required to appoint counsel for military capital habeas petitioners. The court would have the choice to appoint either a private attorney or the Kansas Federal

Public Defender Organization to represent the petitioner. If the court chose to appoint a private attorney, that lawyer would be paid with Criminal Justice Act funds, but the Act's hourly rate, cap on total compensation, or limitations on funding for expert assistance would not apply. Courts would review legal issues and mixed questions of fact and law under a *de novo* standard, but would generally presume the military courts' findings of fact to be correct.

Because the bill is an amendment to the Uniform Code of Military Justice, it could be passed through the expedient means of attaching it to a Department of Defense authorization act. Thus, the proposed legislation is a viable mechanism to remove the two major impediments to meaningful habeas review of military death penalty cases: the lack of a right to counsel and the constricted scope of review.

#### VII. Conclusion

Under current law, federal habeas review does not provide a meaningful assessment of whether a court-martial conviction was tainted by constitutional error. Two factors combine to rob federal habeas review of its importance: a lack of counsel for the petitioners and an extremely narrow scope of review. While a hollow habeas review may be acceptable in most military cases, death penalty cases are different. Due to its enormity and irrevocability, the death penalty is a punishment apart from all others. Just as Congress recognized that difference in 1950, when it gave condemned servicemembers preferred access to the

Court of Military Appeals, Congress should recognize that difference now and establish heightened protections for condemned servicemembers during federal habeas review.

Chief Justice Warren observed that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."<sup>358</sup> Without a meaningful opportunity to challenge their sentences through the federal habeas review process, military death row inmates are stripped of an important means of protecting their most basic right of all.

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## NOTES

1. James J. Fisher, *A Soldier Is Hanged*, KANSAS CITY STAR, Apr. 13, 1961, at 7.

2. *Bennett Hanged After Appeal to President is Denied*, LEAVENWORTH TIMES, Apr. 13, 1961, at 1.

3. This account of Bennett's last words and Colonel Cox's reply comes from the *Leavenworth Times* article, *supra* note 2. The account in the official after-action report differs somewhat. The after-action report relates:

When given an opportunity to make a last statement by the Commandant, Bennett stated substantially as follows: "I wish to make a last statement. Colonel Cox I want to take this last opportunity to thank you and all of your staff, whoever they may be, for all your help and all you have done for me and all the things you have tried to do for me. May God have mercy on your soul."

Memorandum from Captain David J. Anderson to Office of the Provost Marshal General at 2 (13 Apr. 1961) (filed in Record, United States v. Bennett, 7 C.M.A. 97, 21 C.M.R. 223 (1956) (No. 7709) (on file at Federal Records Center, Suitland, Md.) [hereinafter Bennett Record]).

Bennett's final sentence as related by the after-action report was probably delivered by Colonel Cox, as reported by the *Leavenworth Times*. (The after-action report indicates that

Patrick Prosser of the *Leavenworth Times* attended the execution. *Id.*) The United States Disciplinary Barracks' records on the execution include the "Execution order as read to Bennett." Index to File of Prisoner John A. Bennett at 2 (on file at United States Disciplinary Barracks, Fort Leavenworth, Kansas). Beneath the execution order is a script for the Commandant to read. The script provided that the Commandant was to ask, "Prisoner Bennett you have heard the orders directing your execution. Have you any last statement to make?" The script then called for the Commandant to state, "May the Lord have mercy on your soul[.]" Order of Execution (20 March 1961) (on file at United States Disciplinary Barracks, Fort Leavenworth, Kansas).

4. *Leavenworth Times*, *supra* note 2. Bennett had been convicted of rape and attempted premeditated murder of an 11-year-old Austrian girl. Bennett, 7 C.M.A. at 99, 21 C.M.R. at 225. *The Navy Times* reported that Bennett "was the only military prisoner hanged for rape during peacetime." Charles H. Bogino, *Way Clear for First Executions Since 1961*, NAVY TIMES, July 25, 1988, at 10.

It is questionable whether imposing the death penalty for rape remains constitutionally permissible. Sixteen years after Bennett's execution, the Supreme Court ruled that the Eighth Amendment prohibits a death sentence for raping an adult woman. *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion).

*Bennett* is distinguishable from *Coker* in that Bennett's victim was an 11-year-old girl. One commentary, however, notes,



"Although the Court states the issue in the context of the rape of an adult woman, *id.*, 592, the opinion at no point seeks to distinguish between adults and children." CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1402 n.18 (Johnny H. Killian & Leland E. Beck, eds., 1987) [hereinafter CONSTITUTION OF THE UNITED STATES OF AMERICA]. The Florida Supreme Court has held that *Coker* precludes imposing the death penalty for rape of a child under 12. *Buford v. State*, 403 So. 2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163 (1982); *accord*, *Collins v. State*, 236 S.E.2d 759, 761-62 (Ga. 1977) (Jordan, J., concurring). The Mississippi Supreme Court reached the opposite conclusion. *Upshaw v. State*, 350 So. 2d 1358 (Miss. 1977); *but see* *Leatherwood v. State*, 548 So. 2d 389, 403-06 (Miss. 1989) (Robertson, J., concurring). One commentator has maintained that "homicide may be the only crime for which death may be imposed under the eighth amendment." Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 3 n.4 (1982).

5. The Army Board of Review's decision was unreported. The Court of Military Appeals' decision is reported at 7 C.M.A. 97, 21 C.M.R. 223 (1956).

6. *See generally* *Bennett v. Davis*, 267 F.2d 15 (10th Cir. 1959); *Bennett v. Cox*, 287 F.2d 883 (10th Cir. 1961). The second appeal was dismissed when counsel failed to file a brief to support the appeal.

7. United States v. Bennett, 11 C.M.A. 799 (1960) (orders denying petition for writ of error coram nobis and stay of execution).

8. NATIONAL CRIMINAL JUSTICE INFO. AND STATISTICS SERV., U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1977 8 (1978). Including Bennett's execution, 53 were for rape without murder, 106 were for murder (21 of which also involved rape), and one was for desertion. *Id.*

9. Article 71(a) of the Uniform Code of Military Justice requires presidential approval before a death sentence can be executed. 10 U.S.C. § 871(a) (1988).

President Eisenhower personally approved Bennett's death sentence on July 2, 1957. Bennett Record, *supra* note 3. On April 12, 1961, Bennett sent a plea for clemency to President Kennedy. Bennett's telegram stated in part, "Because I haven't kill [sic] anyone therefore I should not be killed. The old testament only asks for an 'eye for an eye.' Will you please in the name of God and mercy spare my life." Bennett Record, *supra* note 3. The same day, the White House answered:

Your telegram to the President has been received and he has asked me to reply. The points raised in your message were carefully considered by the President. His decision to accept the sentence imposed by the court-martial, approved by all military courts, approved by President Eisenhower, and sustained by

civilian courts remains unchanged. Signed: Lee C.

White[, ] Assistant Special Counsel to the President[.]  
Bennett Record, *supra* note 3. Interestingly, the father of  
Bennett's victim had written in support of commuting the death  
sentence to confinement for life. *Id.*

Lee C. White, the Assistant Special Counsel to the President  
who handled the *Bennett* case, notes that "President Kennedy was  
very personally involved in the decision process since it is one  
thing to regard such an issue in an academic or theoretical  
manner and quite another to have the awesome responsibility of  
determining whether an individual is to live or be executed."  
Letter from Lee C. White to the author (Nov. 15, 1993) (on file  
with the author).

10. The Court of Military Appeals has affirmed only one  
death sentence since Bennett's. *United States v. Henderson*, 11  
C.M.A. 556, 29 C.M.R. 372 (1960). President Kennedy commuted  
that death sentence to confinement for life. Action by the  
President of the United States, in Record, *Henderson*, 11 C.M.A.  
556, 29 C.M.R. 372 (on file at Federal Records Center, Suitland,  
Md.) [hereinafter *Henderson Record*]. While the Judge Advocate  
General of the Navy had recommended that Henderson's death  
sentence be approved, the Secretary of the Navy recommended  
commuting the sentence due to "a reasonable possibility that his  
mentality is impaired." Memorandum from Secretary of the Navy  
W.B. Franke to the Secretary of Defense (5 Dec 1960), in  
*Henderson Record*, *supra*. Secretary of Defense Gates and Attorney

General Rogers concurred in the Secretary of the Navy's recommendation. Memorandum from Paul B. Fay, Jr., Under Secretary of the Navy, to Byron R. White, Deputy Attorney General (21 Jul 1961), in Henderson Record, *supra*.

Article 71(a)'s requirement for presidential approval of death sentences was based on Article of War 48(a), which required presidential confirmation before a death sentence could be carried out. H.R. REP. 491, 81st Cong., 1st Sess. 33 (1949); 62 Stat. 627, 635 (1948). The 1948 revision of the Articles of War eliminated a longstanding wartime exception to the presidential confirmation requirement. See Article of War 65, 2 Stat. 359, 367 (1806); see also Article of War 105, 18 Stat. 228, 239 (1873); Article of War 48, 39 Stat. 650, 658 (1916); Article of War 48, 41 Stat. 787, 796-97 (1920). Under the pre-1948 Articles of War,

commanding generals of armies in the field in time of war were empowered to order death sentences carried out. The Articles for the Government of the Navy, on the other hand, required approval by the President of the United States of any sentence to death, except in very limited situations.

Lieutenant Colonel Gary D. Solis, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 8 (1989). Compare Article of War 48, 41 Stat. 787, 796-97 (1920) with Article for the Government of the Navy 19, 12 Stat. 600, 605 (1862).

11. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW, U.S.A.

601 (1994) [hereinafter DEATH ROW, U.S.A.]. The four death penalty cases that have been affirmed by the Courts of Military Review are *United States v. Curtis*, 38 M.J. 530 (N.M.C.M.R. 1993) (en banc); *United States v. Loving*, 34 M.J. 956 (A.C.M.R.), *reconsideration denied*, 34 M.J. 1065 (A.C.M.R. 1992); *United States v. Murphy*, 36 M.J. 1137 (A.C.M.R. 1993) (en banc); and *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992), *aff'd upon further consideration*, 37 M.J. 751 (A.C.M.R. 1993).

The four death penalty cases currently pending on the Court of Military Appeals' docket equals the total number of death penalty cases that court received from 1961 to 1989. The four cases heard during that period were *United States v. Kemp*, 13 C.M.A. 89, 32 C.M.R. 89 (1962); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983); *United States v. Rojas*, 17 M.J. 154 (C.M.A. 1984); and *United States v. Hutchinson*, 18 M.J. 281 (C.M.A.) (summary disposition), *cert. denied*, 469 U.S. 981 (1984). The court set aside the death sentence in *Kemp*. In *Matthews*, the Court of Military Appeals ruled that the military death penalty system then in effect was unconstitutional under *Furman v. Georgia*, 408 U.S. 238 (1972). See generally Major Gregory F. Intoccia, *Constitutionality of the Death Penalty Under the Uniform Code of Military Justice*, 32 A.F.L. REV. 395 (1990); Kevin K. Spradling & Kevin K. Murphy, *Capital Punishment, the Constitution, and the Uniform Code of Military Justice*, 32 A.F.L. REV. 415 (1990); Captain Annamary Sullivan, *The President's Power to Promulgate Death Penalty Standards*, 125 MIL. L. REV. 143, 147-

49 (1989). Following *Matthews*, the Court of Military Appeals set aside the death sentence in *Hutchinson*. The court remanded *Rojas* to the Navy-Marine Corps Court of Military Review due to irregularities during that court's previous consideration of the case. As required by the Court of Military Appeals' *Matthews* decision, the Navy-Marine Corps Court set aside *Rojas*' death sentence upon remand. *United States v. Rojas*, No. 81 2019 (N.M.C.M.R. Aug. 23, 1984) (LEXIS, Miltry library, Courts file).

12. *United States v. Curtis*, 32 M.J. 252 (C.M.A.), *cert. denied*, 112 S. Ct. 406 (1991); *see generally* Anthony M. Henderson, Casenote, *Capital Punishment Under the Presidential Executive Powers: United States v. Curtis*, 19 S.U.L. REV. 189 (1992). *Curtis* was the first case to reach the Court of Military Appeals in which a death sentence had been adjudged under the post-*Matthews* death penalty scheme. *Murphy v. Judges of United States Army Court of Military Review*, 34 M.J. 310, 311 n.1 (C.M.A. 1992).

Justices White and Blackmun dissented from the Supreme Court's denial of certiorari. *Curtis v. United States*, 112 S. Ct. 406 (1991). The petition for writ of certiorari raised two issues. First, did Congress authorize the President to promulgate death penalty aggravating factors for the military justice system and, if so, does the President have the constitutional authority to promulgate such standards? Second, can a court-martial panel with fewer than 12 members impose a death sentence? *Petition for Writ of Certiorari, Curtis v.*

United States, 112 S. Ct. 406 (1991) (No. 91-11). The Solicitor General's brief in opposition was limited to arguing that the issues were not ripe because the Court of Military Appeals had not yet ruled on a number of case-specific challenges to Curtis' death sentence. Brief in Opposition, Curtis v. United States, 112 S. Ct. 406 (1991) (No. 91-11).

13. "[F]ederal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted." Schlesinger v. Councilman, 420 U.S. 738, 758 (1975); see also Gusik v. Schilder, 340 U.S. 128 (1950); see generally 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 26-33.00 (1991); Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 67-76 (1985); John E. Thurman, Annotation, *Review by Federal Civil Courts of Court-Martial Convictions--Modern Status*, 95 A.L.R. FED. 472, 490-505 (1989) [hereinafter Annotation]. Any habeas corpus petition challenging a military death sentence filed before presidential approval would likely be deemed premature. Of course, since death row inmates have an obvious interest in delay of any kind, see *Mercer v. Armantrout*, 864 F.2d 1429, 1433 (8th Cir. 1988), no servicemember under a military death sentence would have an incentive to seek habeas relief before presidential action on the sentence.

14. Richard Faust, Tina J. Rubenstein & Larry W. Yackle, *The Great Writ in Action: Empirical Light on the Federal Habeas*

*Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 707 (1990-1991) [hereinafter *Empirical Light*]. Clarence Darrow made a similar point more colloquially: "I will guarantee that every man waiting for death in Sing Sing is there without the aid of a good lawyer." CLARENCE DARROW, ATTORNEY FOR THE DAMNED 100 (Arthur Weinberg ed. 1957).

15. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1945).

16. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868).

17. GILLIGAN & LEDERER, *supra* note 13, § 26-31.00. For a history of federal habeas corpus review of courts-martial, see Rosen, *supra* note 13, at 18-38, 44-64; Thomas M. Strassburg, *Civilian Judicial Review of Military Criminal Justice*, 66 MIL. L. REV. 1, 9-21, 25-30 (1974); *Developments in the Law--Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1209-16 (1970) [hereinafter *Developments*].

Of course, the Court of Military Appeals and the Courts of Military Review also have the power to issue writs of habeas corpus. See generally *Noyd v. Bond*, 395 U.S. 683 (1969) (expressly recognizing the Court of Military Appeals' power to issue writs under the All Writs Act, which is currently codified at 28 U.S.C. § 1651(a) (1988)); *Developments, supra*, at 1234 (discussing early Court of Military Appeals extraordinary relief cases); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979) (recognizing that the Courts of Military Review possess authority to issue writs). However, the habeas practice of the Court of



Military Appeals and Courts of Military Review is beyond the scope of this thesis.

18. 28 U.S.C. § 2241 (1988).

19. "Confinement is a necessary incident of a sentence of death, but not a part of it." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004(e) (1984) [hereinafter MCM].

20. Burns v. Wilson, 346 U.S. 137, 139 & n.1 (1953) (plurality opinion).

21. 10 U.S.C. § 876 (1988).

22. Article of War 53, ch. 625, § 230, 62 Stat. 604, 639 (current version at 10 U.S.C. § 876 (1988)).

23. Gusik v. Schilder, 340 U.S. 128, 132 (1950); *see generally* Strassburg, *supra* note 17, at 31-32; Donald T. Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1, 16 (1971). Because of its interpretation of the statute, the Court did not reach the issue of whether the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, would preclude Congress from eliminating habeas corpus review of courts-martial. Gusik, 340 U.S. at 132-33.

24. S. REP. NO. 486, 81st Cong., 1st Sess. 32 (1949); H.R. REP. NO. 491, 81st Cong., 1st Sess. 35 (1949) (excepting "a petition for a writ of habeas corpus in Federal court" from Article 76's finality provision); 96 CONG. REC. 1414 (1950) (statements of Senators McCarran and Kefauver). *See generally*

Schlesinger v. Councilman, 420 U.S. 738, 750-51 (1975)  
(discussing Article 76's legislative history).

25. Pub. L. No. 98-209, 97 Stat. 1393.

26. The relevant portions of the Military Justice Act of 1983 are codified as amended at 10 U.S.C.A. § 867a (West Supp. 1993), and 28 U.S.C.A. § 1259 (West Supp. 1993). This extension of the Supreme Court's certiorari jurisdiction represented the first time that courts-martial were directly reviewable by an Article III court. 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.52 (2d ed. 1993). See generally Scott A. Hancock, *Keeping a Perspective*, ARMY LAW., Nov. 1988, at 24; Eugene R. Fidell, *Review of Decisions of the United States Court of Military Appeals by the Supreme Court of the United States*, 16 Mil. L. Rep. (Pub. L. Educ. Inst.) 6001 (1988); James P. Pottorff, *The Court of Military Appeals and the Military Justice Act of 1983: An Incremental Step Towards Article III Status?*, ARMY LAW., May 1985, at 1; Andrew S. Effron, *Supreme Court Review of Decisions by the Court of Military Appeals: The Legislative Background*, ARMY LAW., Jan. 1985, at 59; Bennett Boskey & Eugene Gressman, *The Supreme Court's New Certiorari Jurisdiction Over Military Appeals*, 102 F.R.D. 329 (1984).

Only cases actually decided by the Court of Military Appeals fall within the Supreme Court's certiorari jurisdiction; "[t]he Supreme Court may not review by a writ of certiorari . . . any action of the Court of Military Appeals in refusing to grant a petition for review." UCMJ art. 67a(1), 10 U.S.C.A. § 867a(a).

Because cases in which a Court of Military Review affirms a death sentence fall within the Court of Military Appeals' mandatory jurisdiction, *id.* at art. 67(a)(1), 10 U.S.C. § 867(a)(1), all such cases will be eligible for certiorari.

27. 28 U.S.C. § 1257 (1988).

28. Before seeking federal habeas review, a state inmate may have filed two certiorari petitions at the United States Supreme Court--one upon the completion of direct appeals within the state system and one upon the completion of state postconviction proceedings. See American Bar Ass'n Task Force on Death Penalty Habeas Corpus, Background Report on Death Penalty Habeas Corpus Issues, *reprinted in Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 9, 55 (1990) [hereinafter ABA Background Report].

29. "[T]he Supreme Court is not primarily concerned with the correction of errors in lower court decisions. . . . The Court's aim, rather, is to resolve the conflicts among the lower courts and to determine questions of importance. ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE 193 (7th ed. 1993) [hereinafter SUPREME COURT PRACTICE].

30. SUP. CT. R. 10.1. Since the Supreme Court acquired certiorari jurisdiction over military cases in 1984, the Court has received more than 200 certiorari petitions. SUPREME COURT PRACTICE, *supra* note 29, at 84. The Court has granted only five. *Davis v. United States*, 114 S. Ct. 379 (1993) (order granting certiorari); *Weiss v. United States*, 114 S. Ct. 752, 760 (1994);

Solorio v. United States, 483 U.S. 435 (1987); Jordan v. United States, 498 U.S. 1009 (1990); and Goodson v. United States, 471 U.S. 1063 (1985). In *Jordan* and *Goodson*, the Court granted the petition, vacated the Court of Military Appeals' judgment, and remanded the case for further consideration in light of another newly-announced Supreme Court ruling.

31. J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 919 (1983). See generally SUPREME COURT PRACTICE, *supra* note 29, at 239-43.

32. The Claims Court has since been renamed the United States Court of Federal Claims. Court of Federal Claims Technical and Procedural Improvement Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506; see generally Loren A. Smith, *The Renovation of an Old Court*, 40 FED. B. NEWS & J. 530 (1993). For a discussion of that court's authority to collaterally review court-martial convictions, see GILLIGAN & LEDERER, *supra* note 13, § 26-20.00.

33. *Matias v. United States*, 19 Cl. Ct. 635, 639, *aff'd*, 923 F.2d 821 (Fed. Cir. 1990) (referring to the government's argument advanced in a motion to dismiss). *Matias* did not involve a petition for a writ of habeas corpus; rather, *Matias* brought suit in the Claims Court seeking back pay and correction of his military records by voiding his court-martial conviction. *Id.* at 637.

34. The court noted that during his statement to the Senate Armed Services Committee, Chief Judge Everett addressed whether the Court of Military Appeals would "favor a system whereby the accused would not have a right of collateral attack if Supreme Court Review could be sought." *Matias*, 19 Cl. Ct. at 641 (quoting *The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 2d Sess. 136 (1982) [hereinafter *Hearings*])). Chief Judge Everett indicated:

We do not believe that the right of an accused to undertake collateral attack should be cut off simply because certiorari to the Supreme Court is authorized. Indeed, to attempt such a curtailment might be unconstitutional \* \* \*.

*Matias*, 19 Cl. Ct. at 641 (quoting *Hearings*, *supra*, at 169-70) (alteration in original). The constitutional issue arises from Article I, section 9, clause 2, which provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

35. *Matias*, 19 Cl. Ct. at 641; see GILLIGAN & LEDERER, *supra* note 13, § 26-11.00 (noting that the Claims Court's decision in *Matias* "seems clearly correct"). While the Claims Court denied the United States' motion to dismiss, it granted summary judgment in favor of the United States. *Matias*, 19 Cl. Ct. at 642-50.

36. *Matias v. United States*, 923 F.2d 821, 825 (Fed. Cir.

1990). The Federal Circuit also affirmed the Claims Court's judgment for the United States. *Id.* at 826.

37. The Claims Court was "established under article I of the Constitution of the United States." 28 U.S.C. § 171(a) (1988).

38. S. REP. NO. 98-53, 98th Cong., 1st Sess. 35 (1983). Neither the Claims Court's nor the Federal Circuit's *Matias* decision cited this passage, which explicitly refers to "collateral review in the Article III courts."

A passage from the congressional debate on the Military Justice Act of 1983 provides still more support for the conclusion that the expansion of the Supreme Court's certiorari jurisdiction did not limit habeas review of courts-martial. In a speech on the Senate floor urging the Act's adoption, Senator Kennedy (D-Mass.) commented:

[A]lthough certiorari review of COMA should help alleviate the need for collateral review of military cases, this legislation itself does not modify the general law relating to collateral remedies, and the military defendant should have the same access to collateral remedies as is currently enjoyed by any Federal or State criminal defendant.

129 CONG. REC. 34,312-13 (1983).

39. *Machado v. Commanding Officer*, 860 F.2d 542, 545-46 (2d Cir. 1988). The Second Circuit noted that while litigating the case, which involved an appeal from a federal district court's

denial of habeas relief, the Air Force retreated from the position that the Military Justice Act of 1983 "limited the availability of habeas in the federal district courts." *Id.* The Court added, "[W]e think that such retreat was wise." *Id.* at 546.

Professor Rosen (who was then a Major in the Judge Advocate General's Corps, United States Army, and an instructor at the Judge Advocate General's School, U.S. Army), similarly concluded that "[a]s a matter of law," the Military Justice Act of 1983 "should have little effect" on collateral review of courts-martial. Rosen, *supra* note 13, at 82. However, Professor Rosen cautioned that the Military Justice Act of 1983 might have practical effects on Article III courts' collateral review of courts-martial:

The most immediate and possibly significant manifestation of the certiorari provision may be its effect on the federal courts' perception of the military justice system. On the one hand, federal courts may see the certiorari provision as an indication of congressional intent to reduce the independence of the military courts and thereby feel even less constrained in their review of military convictions. Such a view, however, is not justified. In subjecting Court of Military Appeals' decisions to Supreme Court review, Congress did not provide the lower federal courts with any power of oversight over

military tribunals. More importantly, it at least tacitly elevated the stature of the Court of Military Appeals beyond a mere quasi-judicial, administrative body to a tribunal entitled to the deference of other courts whose judgments are only directly reviewable by the United States Supreme Court.

*Id.* (footnotes omitted).

40. See, e.g., *Monk v. Zelez*, 901 F.2d 885 (10th Cir. 1990) (ordering petitioner's release due to constitutionally-deficient reasonable doubt instruction); *Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990) (finding a due process violation where the military judge's instructions did not require the members to reach a three-fourths majority vote in order to impose life imprisonment). In *Monk*, the Court of Military Appeals rendered its decision before Congress enacted the Military Justice Act of 1983. *United States v. Martin*, 13 M.J. 66 (C.M.A. 1982) (at the time of his court-martial and direct appeal, Monk was named David L. Martin; see *Monk*, 901 F.2d at 885). *Dodson*, on the other hand, unsuccessfully sought certiorari. See *Dodson v. United States*, 479 U.S. 1006 (1986). The issue upon which the Tenth Circuit Court of Appeals ruled for *Dodson* was not raised in his certiorari petition. See *Petition for a Writ of Certiorari, Dodson v. United States*, 479 U.S. 1006 (1986) (No. 86-407).

41. An unsuccessful certiorari petition recently contended that "the Tenth Circuit so restricts federal court review of constitutional issues raised in military habeas corpus petitions



that the right to file a petition for habeas corpus in the Tenth Circuit is rendered meaningless." Petition for Writ of Certiorari at 22-23, *Lips v. Commandant*, 114 S. Ct. 920 (1994) (No. 93-503) (order denying petition for writ of certiorari).

42. *Hiatt v. Brown*, 339 U.S. 103, 111 (1950). See generally *Rosen*, *supra* note 13, at 20-24, 28-38, 44-50; see also WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 52-53 (2d ed. 1920). The Supreme Court originally articulated this scope of review in *Ex parte Reed*, 100 U.S. 13, 23 (1879), which was the first habeas corpus case involving a court-martial conviction to reach the Supreme Court. *Rosen*, *supra* note 13, at 29. Beginning in 1943, several federal courts expanded habeas review of courts-martial to encompass constitutional claims. See generally *id.* at 45-48; Robert S. Pasley, Jr., *The Federal Courts Look at the Court-Martial*, 12 U. PITT. L. REV. 7 (1950). However, in *Hiatt v. Brown*, the Supreme Court held that the Fifth Circuit erred by extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, the competence of the law member and defense counsel.

339 U.S. at 110. See generally *Rosen*, *supra* note 13, at 48-49.

Professor Rosen notes that later in the same term in which *Brown* was decided, the Court issued its opinion in *Whelchel v.*

*McDonald*, 340 U.S. 122 (1951), "which implicitly recognized that review would extend beyond questions of jurisdiction." Rosen, *supra* note 13, at 50. However, Professor Bishop observed, "It has been said that *Whelchel* expanded the concept of 'jurisdiction' in habeas corpus review of courts-martial, but the expansion is measurable with a micrometer." Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 48 (1961) (footnote omitted).

43. Rosen, *supra* note 13, at 50 (citing *Burns v. Wilson*, 346 U.S. 137 (1951)).

44. CONSTITUTION OF THE UNITED STATES OF AMERICA, *supra* note 4, at 347.

45. *United States v. Dennis*, 4 C.M.R.(A.F.) 872 (1950); *United States v. Burns*, 4 C.M.R.(A.F.) 907 (1950); *United States v. Dennis*, 4 C.M.R.(A.F.) 930 (1950).

46. *Id.* The cases were handled under the Elston Act's appellate procedures. See Article of War 50 (enacted at ch. 625, § 226, 62 Stat. 604, 635 (1948)).

47. *Dennis*, 4 C.M.R.(A.F.) at 907 (ordering that Private Dennis "be hanged by the neck until dead"); *Burns*, 4 C.M.R.(A.F.) at 930 (ordering that Staff Sergeant Burns "be hanged by the neck until dead").

48. *Dennis*, 4 C.M.R.(A.F.) at 956.

49. *Burns v. Lovett*, 104 F. Supp. 312 (D.D.C. 1952); *Dennis v. Lovett*, 104 F. Supp. 310 (D.D.C. 1952). That court's

jurisdiction arose from the fact that Burns and Dennis were confined in Japan. See *Burns*, 346 U.S. at 851.

Interestingly, one of Burns' and Dennis' counsel on brief before the United States District Court and the Supreme Court was Thurgood Marshall, who was then the Director-Counsel of the NAACP Legal Defense and Educational Fund. *Burns*, 104 F. Supp. at 313; *Dennis*, 104 F. Supp. at 311; *Burns v. Lovett*, 344 U.S. 903 (1952) (order granting certiorari); *Burns*, 346 U.S. at 137. See generally ROGER GOLDMAN & DAVID GALLAN, *THURGOOD MARSHALL: JUSTICE FOR ALL* 116-18 (1992).

50. *Dennis*, 104 F. Supp. at 311; *Burns*, 104 F. Supp. at 313 (quoting *Dennis*, 104 F. Supp. at 311). The district court cited *Hiatt v. Brown*, 339 U.S. 103 (1950), in support of this proposition.

51. *Burns v. Lovett*, 202 F.2d 335 (D.C. Cir. 1952). The two cases were consolidated on appeal.

52. *Id.* at 341-42 (D.C. Cir. 1952). In dissent, Judge Bazelon criticized this scope of review as too narrow. He argued that a "violation of constitutional safeguards designed to assure a fair trial" would "constitute a jurisdictional defect," thus authorizing habeas relief under prevailing Supreme Court standards. *Id.* at 348-49 (Bazelon, J., dissenting).

53. *Id.* at 343-47. Judge Bazelon indicated that he "would remand to the District Court for a hearing on the allegations in the petition." *Id.* at 353 (Bazelon, J., dissenting).

54. *Burns v. Lovett*, 344 U.S. 903 (1952).

55. 344 U.S. 903 (1952).

56. Burns, 346 U.S. at 144 (plurality opinion).

57. *Id.* at 142. The plurality reasoned:

[T]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers--as well as civilians--from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.

*Id.* at 142-43.

58. 346 U.S. at 146 (Jackson, J., concurring).

59. 346 U.S. at 147 (Minton, J., concurring).

60. 346 U.S. at 148-50 (opinion of Frankfurter, J.).

61. *Id.* at 149; *see also* Burns v. Wilson, 346 U.S. 844 (1953) (Frankfurter, J., dissenting from denial of rehearing).

62. 346 U.S. at 150 (Douglas, J., dissenting).

63. *Id.* at 152.

64. *Id.* at 153-54. Finding that the petitioners made a *prima facie* case that their confessions had been coerced, *id.* at 154, the dissent called for "a judicial hearing on the circumstances surrounding their confessions." *Id.* at 152.

65. One prominent commentator on the military justice system opined that because there was no opinion of the Court in

*Burns*, the decision has no precedential value. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pt. 2), 72 HARV. L. REV. 266, 297 (1958) (citing *Hartz v. Woodman*, 218 U.S. 205, 212-14 (1910); *United States v. Pink*, 315 U.S. 203, 216 (1942)). However, the current rule for construing plurality opinions provides that where no single rationale wins majority support, the Court's holding is "that position taken by those Members who concurred in the judgment on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). See generally Note, Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419 (1992).

66. *Airmen Hanged in Guam*, N.Y. TIMES, Jan. 28, 1954, at 7; *Reporter Tells How Men Died*, PITT. COURIER, Feb. 6, 1954, at 1; see generally Herbert Aptheker, *Two Hangings on Guam*, MASSES & MAINSTREAM, Feb. 1955, at 1 (arguing that *Burns* and *Dennis* were innocent).

67. *Rosen*, *supra* note 13, at 7 (footnotes omitted). "[M]ost courts now have either developed their own standard for collateral review of constitutional claims or simply review such claims without any apparent qualification." *Id.* at 58; see also William J. Wolverton, Note, *Federal Habeas Corpus Jurisdiction over Court-Martial Proceedings*, 20 WAYNE L. REV. 919, 924-28 (1974). The Solicitor General recently argued that while "courts have at times encountered difficulties in determining how [the *Burns* full and fair consideration] standard should be applied in

particular case, . . . there has been no significant divergence of views as to whether that standard is the appropriate test for habeas review of military convictions." Brief for the United States in Opposition at 8-9, *Lips v. Commandant, United States Disciplinary Barracks*, 114 S. Ct. 920 (1994) (No. 93-503).

68. Rosen, *supra* note 13, at 57. See also Annotation, *supra* note 13, at 484 (noting that "the case law has been sharply divided on the application and even the validity of the Burns rule, not only between Circuits but, in many cases, even among different decisions from the same Circuits.").

69. Rosen, *supra* note 13, at 64.

70. The Tenth Circuit Court of Appeals itself conceded that its case law concerning the scope of review in military habeas cases is in a "confusing state." *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990).

71. *Monk v. Secretary of the Navy*, 793 F.2d 364, 368-69 (D.C. Cir. 1986); accord *Scott v. United States*, 586 F. Supp. 66, 68 (E.D. Va. 1984) (holding that "the warden or superintendent of the Disciplinary Barracks in which the military prisoner is incarcerated is the legal custodian under federal habeas corpus principles."). The Monk opinion, which Judge Bork authored, held that the District of Columbia federal district court did not have habeas jurisdiction over a United States Disciplinary Barracks inmate. Monk subsequently sought a writ of habeas corpus from the Kansas federal district court. *Monk v. Zelez*, No. 88-3022-O, 1989 U.S. Dist. LEXIS 3296 (D. Kan. Mar. 31, 1989). After

that court denied Monk's petition, *id.*, the Tenth Circuit Court of Appeals reversed and ordered Monk's immediate release. *Monk v. Zelez*, 901 F.2d 885, 894 (10th Cir. 1990). *See also Monk*, 793 F.2d at 371 (Mikva, J., concurring) (noting that "[a] careful review of the record leaves me firmly convinced that there are crucial questions about Monk's guilt that have never been adequately addressed.").

72. *See* DEP'T OF ARMY, REG. 190-55, U.S. ARMY CORRECTIONAL SYSTEM: PROCEDURES FOR MILITARY EXECUTIONS, para. 3-1 (27 Oct. 1986) ("The U.S. Disciplinary Barracks (USDB) is the only Army confinement facility authorized to confine prisoners under the sentence to death during peacetime.").

73. The importance of the Tenth Circuit's military habeas case law is magnified even in non-death cases because most military habeas petitions are filed in that Circuit. *Rosen*, *supra* note 13, at 60 n.345.

74. *Rosen*, *supra* note 13, at 60 n.345. Professor Rosen noted, however, that the Tenth Circuit's cases were "not entirely consistent." *Id.*; *see also id.* at 57 n.332.

75. *Bennett v. Davis*, 267 F.2d 15, 17 (10th Cir. 1959). *See also Day v. Davis*, 235 F.2d 379 (10th Cir.), *cert. denied*, 352 U.S. 881 (1956) (military death penalty case); *Thomas v. Davis*, 249 F.2d 232 (10th Cir. 1957), *cert. denied*, 355 U.S. 927 (1958) (military death penalty case); *Suttles v. Davis*, 215 F.2d 760 (10th Cir.), *cert. denied*, 348 U.S. 903 (1954) (military death penalty case involving three petitioners). Like *Bennett*,

all of the petitioners in *Day, Thomas, and Suttles* were hanged. *Soldier Dies on Gallows at Army Prison*, LEAVENWORTH TIMES, Sept. 23, 1959, at 1; *Convicted Soldier is Hanged at Fort*, LEAVENWORTH TIMES, July 23, 1958, at 1; *Soldiers to Death on Gallows*, LEAVENWORTH TIMES, Mar. 1, 1955, at 1.

76. 797 F.2d 1538 (10th Cir. 1986).

77. *Id.* at 1542 n.6. While reaching the issue's merits, the court of appeals rejected the petitioner's claim that his Fifth Amendment due process rights and Sixth Amendment trial by jury right were violated because he was convicted by a two-thirds vote of a court-martial panel consisting of six members. *See generally* Howard C. Cohen, *The Two Thirds Verdict: A Surviving Anachronism in an Age of Court-Martial Evolution*, 20 CAL. WESTERN L. REV. 9 (1983).

Earlier in the same year, the court had applied the full and fair consideration test and refused to review claims raised in a military habeas petition. *Watson v. McCotter*, 782 F.2d 143, 144-45 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986).

78. 901 F.2d 885 (10th Cir. 1990).

79. *Id.* at 888.

80. *Id.* at 888; *see United States v. Martin*, 13 M.J. 66 (C.M.A. 1982) (at the time of his court-martial and direct appeal, Monk was named David L. Martin; *see supra* note 40). The Court of Military Appeals' *Martin* decision was sharply divided. Judge Fletcher concluded that although the reasonable doubt instruction delivered at trial was "improper and prejudicial,"



the issue had not been preserved. 13 M.J. at 67. Judge Cooke concurred on the basis that the invalidation of the reasonable doubt instruction should apply only prospectively. *Id.* at 68 (Cooke, J., concurring in the result). Chief Judge Everett dissented, contending that the military judge's reasonable doubt instruction was erroneous, the defense made "a suitable objection," and the error was not harmless beyond a reasonable doubt. *Id.* at 69 (Everett, C.J., dissenting). Chief Judge Everett also found that Monk was prejudiced by an erroneous denial of testimonial immunity to an alternative suspect. *Id.* at 69-70. The fractious nature of the Court of Military Appeals' decision likely increased the Tenth Circuit Court of Appeals' willingness to order Monk's release. See 901 F.2d at 892 (noting that a majority of the Court of Military Appeals, "although not the same majority, agreed that the reasonable doubt instruction given at Monk's court-martial violated his constitutional right to be convicted only upon proof beyond a reasonable doubt, that Monk had properly objected to this instruction at trial and that the instruction as given prejudiced Monk.").

81. Monk, 901 F.2d at 888 (quoting Mendrano, 797 F.2d at 1542 n.6). The opinion also quoted the Fifth Circuit's opinion in *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 911 (1976). Monk, 901 F.2d at 888. See also *Lundy v. Zelez*, 908 F.2d 593 (10th Cir. 1990) (applying same scope of review).

82. 917 F.2d 1250 (10th Cir. 1990).

83. 519 F.2d 184 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976).

84. The district court's opinion granting the writ has been characterized as "an extraordinary display of judicial eccentricity." MICHAEL BILTON & KEVIN SIM, *FOUR HOURS IN MY LAI* 356 (1992). The opinion's most unusual passage quotes a portion of the Bible's Book of Joshua and notes that "Joshua did not have charges brought against him for the slaughter of the civilian population of Jericho. But then 'the Lord was with Joshua' we are told." *Calley v. Callaway*, 382 F. Supp. 650, 711 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976). See generally Gerard Hannon, Note, *Civilian Review of Military Habeas Corpus Petitions: Is Justice Being Served?*, 44 *FORD. L. REV.* 1228, 1238-44 (1976).

85. *Calley*, 519 F.2d at 199.

86. *Id.* at 200.

87. *Id.*

88. *Id.* at 203. The *Calley* opinion includes the following summary of the scope of review:

Military court-martial convictions are subject to collateral review by federal civil courts on petitions for writs of habeas corpus where it is asserted that the court-martial acted without jurisdiction, or that substantial constitutional rights have been violated, or that exceptional circumstances have been presented which are so fundamentally defective as to result in a

miscarriage of justice. Consideration by the military of such issues will not preclude judicial review for the military must accord to its personnel the protection of basic constitutional rights essential to a fair trial and the guarantee of due process of law. The scope of review for violations of constitutional rights, however, is more narrow than in civil cases. Thus federal courts should differentiate between questions of fact and law and review only questions of law which present substantial constitutional issues. Accordingly, they may not retry the facts or reevaluate the evidence, their function in this regard being limited to determining whether the military has fully and fairly considered contested factual issues. Moreover, military law is a jurisprudence which exists separate and apart from the law governing civilian society so that what is permissible within the military may be constitutionally impermissible outside it. Therefore, when the military courts have determined that factors peculiar to the military require a different application of constitutional standards, federal courts are reluctant to set aside such decisions.

*Id.* Judge Anderson dissented, maintaining that the scope of review adopted by the majority "is too broad." *Id.* at 1263 (Anderson, J., dissenting).

Professor Rosen advocated adoption of the Fifth Circuit's *Calley v. Callaway* standard. Rosen, *supra* note 13, at 63, 88. The Solicitor General recently called the Fifth Circuit's *Calley* opinion "the leading articulation of the *Burns* test." Brief for the United States in Opposition at 9, *Lips v. Commandant, U.S. Disciplinary Barracks*, 114 S. Ct. 920 (1994) (No. 93-503); see also *id.* at 9-10 n.5.

89. 943 F.2d 1261 (10th Cir. 1991).

90. 10 U.S.C. § 856.

91. For a discussion of the doctrine of nondelegability, see CONSTITUTION OF THE UNITED STATES OF AMERICA, *supra* note 4, at 69-80. See also *Mistretta v. United States*, 488 U.S. 361 (1989) (holding that the U.S. Sentencing Commission did not violate the separation of powers doctrine).

92. The court noted the following factors supporting review:

(1) a substantial constitutional question has been raised concerning the nondelegation doctrine as applied to art. 56, UCMJ, (2) the question is one of law, which has not been addressed by the Court of Military Appeals, although it has been rejected by other military courts for varying reasons, (3) the question does not turn on disputed facts, (4) the formulary order of the Court of Military Appeals denying relief does not indicate the consideration given to petitioner's claims or admit of review, (5) petitioner

attempted to exhaust his military remedies, and (6) the government does not argue that review is inappropriate, but rather has defended on the merits.

Khan, 943 F.2d at 1263 (citations omitted). "On the other hand," the court found, "the potential for a different constitutional norm would counsel against review." *Id.*

93. 943 F.2d at 1263. The court ruled against the petitioner on the merits. *Id.* at 1263-65.

94. Castillo v. Hart, No. 91-3215-AJS, 1993 U.S. Dist. LEXIS 18609, at \*4 (D. Kan. Dec. 17, 1993).

95. 997 F.2d 808 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994).

96. The district court granted habeas relief on the grounds that the government counsel violated Lips' right against self-incrimination by referring to Lips' post-arrest silence. Lips v. Commandant, USDB, No. 88-3396-R, 1992 U.S. Dist. LEXIS 12018, at \*5-16 (D. Kan. July 31, 1992). The Air Force Court of Military Review had previously rejected an appeal based in part on this same ground, ruling that any error had been waived by the trial defense counsel's failure to object. United States v. Lips, 22 M.J. 679, 683 (A.F.C.M.R. 1986), *petition denied*, 24 M.J. 45 (C.M.A. 1987).

The district court rejected Lips' argument that he was entitled to relief due to an allegedly erroneous evidentiary ruling; the district court reasoned that Lips "failed to show that the trial judge's ruling resulted in a fundamentally unfair

trial." *Id.* at \*4; see also *Lips*, 24 M.J. at 681-82 (upholding the military judge's evidentiary ruling). The court of appeals rejected *Lips*' cross-appeal on this evidentiary ground. 997 F.2d at 812.

97. 997 F.2d at 810.

98. 997 F.2d at 811. See also *Reed v. Hart*, No. 93-3154, 1994 U.S. App. LEXIS 3562, at \*5 (10th Cir. Mar. 1, 1994) (citing *Lips* and noting that "we have held that if the issue was raised before the military courts, four conditions must be met before a district court's habeas review of a military decision is appropriate.").

99. *Id.* at 812.

100. In light of the apparent conflict between *Khan* and *Lips*, it is interesting to note that Judge Baldock, who wrote the *Khan* opinion, 943 F.2d at 1262, was part of the *Lips* panel. 997 F.2d at 809.

An unpublished Tenth Circuit Court of Appeals order and judgment issued one week before *Lips* adds further uncertainty concerning the circuit's scope of review for military habeas cases. In *Spindle v. Berrong*, No. 93-3056, 1993 U.S. App. LEXIS 15362 (10th Cir. June 24, 1993), "the Tenth Circuit stated its scope of review as that articulated in *Dodson*, employed neither the *Khan* balancing test nor the *Lips* adequate consideration only test, reached the substantive [Confrontation Clause issue], and decided the issue on the merits." *Travis v. Hart*, No. 92-3011-RDR, 1993 U.S. Dist. LEXIS 10911, at \*7 n.1 (D. Kan. July 13,

1993), *aff'd*, 16 F.3d 417 (10th Cir. 1994) (table). However, a Tenth Circuit rule in effect at the time *Spindle* was decided provided that an unpublished order and judgment "ha[s] no precedential value." 10TH CIR. R. 36.3. See also In re Citation of Unpublished Opinions/Order and Judgments, 151 F.R.D. 470 (1993) (modifying Rule 36.3).

101. Watson, 782 F.2d at 145; Lips, 997 F.2d at 812 n.2. This rule appears to contradict the fourth *Calley/Dodson* standard, which provides that "military courts must give adequate consideration to the issue involved." Calley, 519 F.2d at 203; Dodson, 917 F.2d at 1253 (quoting *id.*). Under Lips' interpretation, the only way the fourth *Calley/Dodson* criterion would not preclude review is if the military courts expressly refused to consider an issue.

102. Lips, 997 F.2d at 812; Watson, 782 F.2d at 145; Wolff v. United States, 737 F.2d 877, 879 (10th Cir.), *cert. denied*, 469 U.S. 1076 (1984); see generally Rosen, *supra* note 13, at 76-80.

The "cause and prejudice" exception to the waiver rule is extremely narrow, see *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), and the Supreme Court "has been extraordinarily demanding in its application of adequate 'cause' for failing to raise an issue at trial." GILLIGAN & LEDERER, *supra* note 13, at 202. The Supreme Court has held that even where the cause and prejudice standard is not met, a habeas court can reach a defaulted issue to prevent a "fundamental miscarriage of justice." See *Keeney v.*

Tamayo-Reyes, 112 S. Ct. 1715, 1721 (1992). In death penalty cases, such a miscarriage of justice occurs where "but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 112 S. Ct. 2514, 2517 (1992).

103. See *Watson*, 782 F.2d. at 145 (noting that "we will entertain military prisoners' claims if they were raised in the military courts and those courts refused to consider them.").

104. See *Stone v. Powell*, 428 U.S. 465 (1976) (adopting full and fair consideration test for habeas review of state courts' search and seizure exclusionary rule decisions); see generally Philip Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule after Stone v. Powell*, 82 COLUM. L. REV. 1, 17-18 (1982).

105. Halpern, *supra* note 104, at 17-18; but see *Gamble v. Oklahoma*, 583 F.2d 1161, 1165 (10th Cir. 1978) (allowing habeas review if the state court does not provide "colorable application of the correct Fourth Amendment constitutional standards.").

106. *Castillo v. Hart*, No. 91-3215-AJS, 1993 U.S. Dist. LEXIS 18609, at \*6 (D. Kan. Dec. 20, 1993); *Bramel v. Hart*, No. 91-3186-AJS 1993 U.S. Dist. LEXIS 18600, at \*5-7 (D. Kan. Nov. 30, 1993); *DuBose v. Hart*, No. 91-3149-AJS, 1993 U.S. Dist. LEXIS 17204, at \*4-5 (D. Kan. 1993); *Futcher v. Hart*, No. 91-3137-AJS, 1993 U.S. Dist. LEXIS 17205, at \*5-7 (D. Kan. Nov. 9, 1993); *Boos v. U.S. Disciplinary Barracks, Commandant*, No. 93-3132-RDR, 1993 U.S. Dist. LEXIS 15607, at \*4-7 (Oct. 29, 1993); *Goff v. Hart*,



No. 91-3130-AJS, 1993 U.S. Dist. LEXIS 14032, at \*5-8 (D. Kan. Sept. 29, 1993); *Travis v. Hart*, No. 92-3011-RDR, 1993 U.S. Dist. LEXIS 10911, at \*6-7 (D. Kan. July 13, 1993), *aff'd*, 16 F.3d 417 (10th Cir. 1994) (table).

Only two of the district court's nine 1993 military habeas opinions announced after the Tenth Circuit Court of Appeals' *Lips* decision omitted an assertion of a discrepancy between *Lips* and *Khan*. *Goltz v. Commandant, U.S.D.B.*, No. 92-3051-RDR, 1993 U.S. Dist. LEXIS 15576 (D. Kan. Oct. 29, 1993); *Bartos v. U.S. Disciplinary Barracks*, No. 91-3135-AJS, 1993 U.S. Dist. LEXIS 15593 (D. Kan. Oct. 18, 1993). In both cases, the court's decision to dismiss the petition for writ of habeas corpus rested entirely on the waiver doctrine. *Goltz*, 1993 U.S. Dist. LEXIS 15576, at \*3; *Bartos*, 1993 U.S. Dist. LEXIS 15593, at \*3. Thus, in neither case was there any need to establish the appropriate scope of review.

107. *Travis v. Hart*, No. 92-3011-RDR, 1993 U.S. Dist. LEXIS 10911 at \*6-7 (D. Kan. July 13, 1993) (footnote omitted), *aff'd*, 16 F.3d 417 (10th Cir. 1994) (table). The Tenth Circuit conceded that "the district court's observation may be correct." *Travis v. Hart*, 16 F.3d 417, No. 93-3291, 1994 U.S. App. LEXIS 2643, at \*4 (10th Cir. Feb. 16, 1994).

108. 114 S. Ct. 920 (1994). *Lips* asked the Supreme Court to resolve three issues, including whether the district court "erred in granting the writ because a military court 'fully and fairly considered' the constitutional issue and found no error."

Petition for a Writ of Certiorari at i, *Lips v. Commandant, United States Disciplinary Barracks*, 114 S. Ct. 920 (1994). None of the briefs before the Court cited any of the district court's opinions expressing concern over the Tenth Circuit's scope of review decisions. Nor were any of those district court opinions published. Accordingly, it is quite possible that the Supreme Court denied Lips' certiorari petition without knowing of the district court judges' concerns. Even had the Court been aware of the district court judges' frustration with the Tenth Circuit's inconsistent case law, the result might have been no different; "[o]rdinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari." SUPREME COURT PRACTICE, *supra* note 29, at 176.

109. In *re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam); *see also Mendrano*, 797 F.2d at 1543-44.

110. See 10TH CIR. R. 35.1 (suggesting that in banc proceedings are intended, in part, to resolve conflicts between a panel decision and the Tenth Circuit's precedent). See also FED. R. APP. P. 35(a) (noting that in banc hearings will not ordinarily be used "except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.").

111. Indeed, *Burns* itself was a death penalty case. While *Burns* has spawned considerable uncertainty, "[t]hat *Burns*

expanded the scope of collateral review of military convictions is readily apparent." Rosen, *supra* note 13, at 54.

112. But see *Graham v. Collins*, 113 S. Ct. 892, 897 (1993) (noting that *Teague v. Lane*'s restriction on retroactive application of new rules "applies to capital cases as it does to those not involving the death sentence.").

113. See generally Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2376-415 (1993). The most significant of the Rehnquist Court's decisions limiting habeas review is *Teague v. Lane*, 489 U.S. 288 (1989), which provides that, with two narrow exceptions, a federal habeas court cannot grant relief based on a new rule of constitutional law. See generally Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C.L. REV. 371 (1991); David R. Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23 (1991); James S. Liebman, *More than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-91). The Court has also made it more difficult for habeas petitioners to raise claims that had not been raised before the state courts, *Keeney v. Tamayo-Reyes*, 112 S. Ct. 2514 (1992), or in an earlier federal habeas petition. *McCleskey v. Zant*, 499 U.S. 467 (1991). During its 1992 Term, the Court further diminished a habeas petitioner's opportunity to obtain relief by adopting a harmless-error standard for habeas review

lower than that applied on direct review. *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993).

114. *Brown v. Allen*, 344 U.S. 443 (1953).

115. *Miranda v. Arizona*, 384 U.S. 406 (1966).

116. *Winthrow v. Williams*, 113 S. Ct. 1745 (1993).

117. *Stone v. Powell*, 428 U.S. 465 (1976).

118. 28 U.S.C. § 2254(d) (1988).

119. *Wright v. West*, 112 S. Ct. 2482 (1992). *See generally* Vivian Berger, *Ax Poised Over Habeas*, NAT'L L.J., Aug. 31, 1992, at S10.

120. *Scott v. Roberts*, 975 F.2d 1473, 1475 (10th Cir. 1992). *See also* *Case v. Mondragon*, 887 F.2d 1388, 1393 (10th Cir.), *cert. denied*, 494 U.S. 1035 (1990) ("No presumption of correctness attaches to legal conclusions or determinations on mixed questions of law and fact. Those are reviewed *de novo* on federal habeas review.").

121. *See* Appendix B. Nine of the 32 opinions were issued after the Tenth Circuit Court of Appeals announced *Lips*. Two of the nine decisions were based solely on waiver, but the remainder of the district court's post-*Lips* opinions noted that the decision would have been the same under either the *Lips* test or the *Khan* balancing test.

In addition to the 32 cases listed in the Appendix, the district court issued opinions in five habeas cases filed by United States Disciplinary Barracks prisoners who were not challenging the results of their courts-martial. *Jefferson v.*

Hart, No. 91-3232-RDR, 1993 U.S. Dist. LEXIS 10907 (D. Kan. July 29, 1993) (granting habeas corpus petition and ordering that petitioner be given a parole hearing); Smoot v. Hart, No. 90-3315-RDR, 1993 U.S. Dist. LEXIS 1549 (D. Kan. Jan. 28, 1993) (dismissing as moot habeas corpus petition seeking sentence credit for time spent on parole); Jackson v. Berrong, No. 90-3161-R, 1992 U.S. Dist. LEXIS 17300 (D. Kan. Oct. 7, 1992) (dismissing as moot habeas corpus petition challenging parole revocation); Little v. Hart, No. 92-3134-R, 1992 U.S. Dist. LEXIS 14103 (D. Kan. Aug. 10, 1992) (dismissing habeas corpus petition challenging parole revocation and forfeiture of good time credit); Jelks v. United States Army Clemency and Parole Board, No. 89-3425-R, 1992 U.S. Dist. LEXIS 12023 (D. Kan. July 28, 1992) (granting habeas corpus petition seeking sentence credit for time spent on parole).

The district court also issued opinions in the cases of five United States Disciplinary Barracks prisoners who sought relief through means other than a habeas petition. Goff v. Lowe, No. 93-3112-RDR, 1993 U.S. Dist. LEXIS 14028 (D. Kan. Sept. 16, 1993) (granting summary judgement for the government in case challenging the results of an administrative disciplinary proceeding); Mansfield v. Hart, No. 91-3155-RDR, 1993 U.S. Dist. LEXIS 4787 (D. Kan. Mar. 8, 1993) (denying claim for damages, injunctive relief, and declaratory judgment arising from USDB disciplinary proceeding); Deardorf v. Berrong, No. 89-3444-RDR, 1992 U.S. Dist. LEXIS 20423 (D. Kan. Dec. 31, 1992) (dismissing

petition for writ of mandamus challenging court-martial conviction); *Strain v. Long*, 92-3239-RDR, 1992 U.S. Dist. LEXIS 20429 (D. Kan. Dec. 8, 1992) (granting summary judgment for the United States in a constitutional tort action challenging use of "intractable status" as an internal control mechanism); *McPhaul v. Reppert*, 86-3251-R, 1992 U.S. Dist. LEXIS 10283 (D. Kan. June 26, 1992) (dismissing constitutional tort action brought by former USDB prisoner). These cases are beyond the scope of this survey of the district court's practice.

I am deeply indebted to Janine Cox, Pro Se Clerk for the United States District Court for the District of Kansas, for her generous and invaluable assistance in surveying that court's military habeas practice.

122. *Lips v. Commandant, USDB*, No. 88-3396-R, 1992 U.S. Dist. LEXIS 12018, (D. Kan. July 31, 1992). Perhaps not coincidentally, Lips was also the only one of the 32 petitioners who was represented by counsel before the district court.

123. 997 F.2d 808 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994); *see supra* notes 95-99 and accompanying text.

124. Telephone Interview with Sergeant First Class Scott, Public Affairs Officer, United States Disciplinary Barracks (Feb. 10, 1994).

125. However, one Disciplinary Barracks prisoner did win a parole hearing and another won credit against his sentence as a result of habeas petitions. *Jefferson v. Hart*, No. 91-3232-RDR, 1993 U.S. Dist. LEXIS 10907 (D. Kan. July 29, 1993); *Jelks v.*

United States Army Clemency and Parole Board, No. 89-3425-R, 1992 U.S. Dist. LEXIS 12023 (D. Kan. July 28, 1992). See *supra* note 121.

126. *Empirical Light*, *supra* note 14, at 681; PAUL H. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 4(c) (1979).

127. See *supra* note 113.

128. Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 520-21 (1988) (footnotes omitted). Again, those figures would likely be lower today due to cases such as *Teague*. Also, these habeas success rates were inflated to some degree by successful systemic attacks. ABA Background Report, *supra* note 28, at 55 n.113.

Professor Mello reports that "[b]etween 1976 and 1988 federal appellate courts ruled in favor of the condemned inmate in 73.2% of the capital habeas appeals heard, compared to only 6.5% of the decisions in non-capital habeas cases." Mello, *supra*, at 521 (footnote omitted). See also Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. Rev. 1015, 1044-45 n.166 (1993); Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman*, 24 COLUM. HUM. RTS. L. REV. 395, 411 (1993); Geraldine Szott Moohr, Note, *Murray v. Giarratano: A Remedy Reduced to a Meaningless Ritual*, 39 AM. U. L. REV. 765, 794 n.229 (1990).

129. *Furman v. Georgia*, 408 U.S. 238 (1972). See *supra* note 11.

130. *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

131. See *supra* note 131 and accompanying text. See also American Bar Ass'n Crim. Just. Section, Report Supporting American Bar Association Recommendations on Death Penalty Habeas Corpus, reprinted in *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 9, 17 (1990) [hereinafter Criminal Justice Section Report] (noting, "Competent and adequately compensated counsel from trial through collateral review is . . . the *sine qua non* of a just, effective, and efficient death penalty system.").

132. Of the four death penalty cases now before the Court of Military Appeals, two have been on appeal since 1987, a third since 1988, and the fourth since 1989. See cases cited in note 11 *supra*.

133. Professor Millemann explains:

At present, 49 of 50 states provide by statute or rule that, after a criminal conviction is finally affirmed on direct appeal, the convicted defendant may file in state court a "collateral" proceeding challenging the legality of the conviction. This proceeding is commonly called a "post-conviction" proceeding, but also is called "habeas corpus" or "coram nobis."



Michael Millemann, *Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*, 48 MD. L. Rev. 455, 457 (1989).

134. Richard J. Wilson & Robert L. Spangenberg, *State Post-conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 336, (1989). See also *Mercer v. Armontrout*, 864 F.2d 1429, 1433 (8th Cir. 1988); Millemann, *supra* note 133, at 485-86 (discussing time demands of capital postconviction representation).

135. Wilson & Spangenberg, *supra* note 134, at 337. The median amount of time spent in postconviction practice was 400 hours before the state trial court, 200 hours before the state supreme court, 65 hours before the United States Supreme Court in connection with the state postconviction proceeding, 305 hours before the federal district court, 320 hours before the court of appeals, and 180 hours before the United States Supreme Court in connection with the federal habeas proceeding.

Because the military has nothing directly analogous to a state postconviction proceeding, see *United States v. Polk*, 32 M.J. 150, 152 (C.M.A. 1991), the time demands before the federal district court will likely more closely approximate those before the state trial court because counsel will be initially formulating the petitioner's arguments at this stage. Judge Cox recently suggested that "[p]erhaps the Joint-Service Committee on Military Justice might consider how collateral attacks on courts-

martial should be litigated." *United States v. Dykes*, 38 M.J. 270, 274 (C.M.A. 1993) (Cox, J., concurring).

136. *Giarratano v. Murray*, 668 F. Supp. 511, 515 (E.D. Va. 1986), *rev'd*, 836 F.2d 1421 (4th Cir.), *aff'd on reh'g*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 492 U.S. 1 (1989). See also *Mercer*, 864 F.2d at 1433.

137. *DEATH ROW, U.S.A.*, *supra* note 11, at 561.

138. Judge Godbold has cautioned that "[t]he demands on these volunteers became so heavy and the pressure of cases so intense that these traditional sources seriously diminished." John C. Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 REC. ASS'N B. CITY N.Y. 859, 866 (1987).

139. The Spangenberg Group, *An Updated Analysis of the Right to Counsel and the Right to Compensation and Expenses in State Post-Conviction Death Penalty Cases* 3 (Dec. 1993) (unpublished report) (on file with American Bar Association Postconviction Death Penalty Representation Project); see also *id.* at 70 (noting that "execution warrants are now routinely filed in Texas including many following affirmance in which no counsel is available.").

Justice Powell has noted that Florida provided state-funded counsel for death row inmates pursuing postconviction relief "because of the inadequacy of using volunteer lawyers." Remarks of Justice Lewis F. Powell at the Eleventh Circuit Judicial Conference (May 12, 1986) (quoted in ABA Background Report, *supra* note 28, at 73 n.188).

140. Michael A. Mello, *Is There A Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065, 1066 (1989).

141. 287 U.S. 45 (1932). See generally WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 149-57 (1955).

142. ANTHONY LEWIS, *GIDEON'S TRUMPET* 113 (1964). *Powell* based the right to appointed counsel on the Fourteenth Amendment's Due Process Clause. 287 U.S. at 71. For a discussion of the *Powell* defendants' retrials, see LEWIS, *supra*, at 257-58.

143. 287 U.S. at 71.

144. *Johnson v. Zerbst*, 304 U.S. 458 (1938). See generally BEANEY, *supra* note 141, at 33-44. In 1790, Congress created a statutory right to appointed counsel for criminal defendants in capital cases tried in federal district courts. Federal Crimes Act of 1790, ch. 9, § 29, 1 Stat. 112, 118 (codified as amended at 18 U.S.C. § 3005 (1988)).

145. *Betts v. Brady*, 316 U.S. 455 (1942), overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963). See generally LEWIS, *supra* note 142, at 115-18; Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 43-56 (1962); BEANEY, *supra* note 141, at 160-64.

146. *Hamilton v. Alabama*, 368 U.S. 52 (1961).

147. 372 U.S. 335 (1963). See generally LEWIS, *supra* note 142.

148. The Warren Court later held that the right to counsel attaches in juvenile proceedings as well. In *re Gault*, 387 U.S. 1 (1967).

149. *Douglas v. California*, 372 U.S. 353 (1963). The Court reasoned:

There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.

*Id.* at 357-58. Justice Clark, who was one of three dissenting justices, criticized the Court's "new fetish for indigency." *Id.* at 359 (Clarke, J., dissenting).

On its face, the Equal Protection Clause, upon which the Court relied, does not extend to the federal government. The Supreme Court has, however, held that the Fifth Amendment's Due Process Clause includes an equal protection guarantee. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying *Brown v. Board of Education*, 347 U.S. 483 (1954) to the District of Columbia school system). The Court of Military Appeals relied on the Fifth Amendment's equal protection component to apply *Batson v. Kentucky*, 476 U.S. 79 (1986), to the military justice system. *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988); see also *United States v. Tuggle*, 34 M.J. 89 (C.M.A. 1992)

(recognizing that it would be an equal protection violation to imprison a servicemember due solely to inability to pay a fine).

150. Cf. Herman Schwartz, *Introduction* to THE BURGER YEARS xi, xvi (Herman Schwartz ed., 1987) ("Between 1964 and June 1974, prisoners rarely lost a case in the Supreme Court. From June 1974 on, however, it became almost impossible for a prisoner to win one . . . .").

151. *Ross v. Moffitt*, 417 U.S. 600 (1974). An earlier Burger Court opinion had extended the right to counsel into some state misdemeanor proceedings. *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that representation by counsel (or a valid waiver of that right) is a prerequisite to imprisonment for any offense, including misdemeanors). In *Scott v. Illinois*, 440 U.S. 367 (1979), the Court held that a defendant who was convicted of a misdemeanor for which confinement is an authorized punishment was not entitled to the appointment of counsel where the court actually imposed a fine and no confinement.

152. Does a criminal defendant have a constitutional right to counsel where more than one appeal is mandated by statute, such as for capital appellants in the military justice system? See UCMJ art. 67(a)(1), 10 U.S.C. § 867(a)(1). *Douglas* did not reach the issue of whether the right to counsel extends to "mandatory review beyond" the first level. 372 U.S. at 356. Subsequent Supreme Court opinions indicate that the right to counsel does not reach mandatory second-level appeals. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("Our cases

establish that the right to appointed counsel extends to the first appeal of right, and no further."); accord *Coleman v. Thompson*, 111 S. Ct. 2546, 2568 (1991).

Even though a capital appellant has a statutory right to counsel before the Court of Military Appeals, UCMJ art. 70, 10 U.S.C. § 870, the issue is not merely academic. A criminal defendant has a constitutional right to the effective assistance of counsel only where there is an underlying constitutional right to counsel. *Coleman*, 111 S. Ct. at 2566. Under the Supreme Court's *dicta* suggesting no right to counsel in second-level mandatory appeals, deficient representation of a condemned appellant before the Court of Military Appeals would not support a constitutional claim of ineffective assistance of appellate counsel. Cf. *Evitts v. Lucey*, 469 U.S. 387 (1985) (holding that criminal appellants have a due process right to effective assistance of counsel on their first appeal as of right).

153. 481 U.S. 551 (1987).

154. *Id.* at 557. The central issue in *Finley* was whether a postconviction counsel who sought to withdraw because the case included no potentially meritorious claims had to follow the procedures that *Anders v. California*, 386 U.S. 738 (1967), established for counsel seeking to withdraw from appellate representation. The Court concluded, "Since respondent has no underlying constitutional right to appointed counsel in state postconviction proceedings, she has no constitutional right to insist on the *Anders* procedures which were designed solely to

protect that underlying constitutional right." *Finley*, 481 U.S. at 557.

Justice Blackmun concurred in the judgment, but indicated that on remand the state courts "should be able to consider whether appointed counsel's review of respondent's case was adequate under Pennsylvania law or the Pennsylvania Supreme Court's remand order." *Id.* at 559 (Blackmun, J., concurring in the judgment).

Joined by Justice Marshall, Justice Brennan dissented on three grounds: (1) the lower court's opinion rested on an independent state ground, (2) the issue decided by the majority was not ripe for review; and (3) *Finley* had a due process and equal protection right to the procedural protections the Pennsylvania court had imposed on her counsel's withdrawal. *Id.* at 559-70 (Brennan, J., dissenting). Justice Stevens reasoned that because it was impossible to tell whether the Pennsylvania court's opinion rested on state law or federal law, he would apply a presumption in favor of a state basis and therefore dismiss the grant of certiorari for want of jurisdiction. *Id.* at 570-72 (Steven, J., dissenting).

Professor Liebman notes, "*Dictum* aside, *Finley* did not present the question whether there is a constitutional right to appointment of counsel in some or all state postconviction proceedings." 1 JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 75 (1988).

155. *Finley*, 451 U.S. at 555.

156. Finley was serving a life sentence for second-degree murder. 481 U.S. at 553.

157. 492 U.S. 1 (1989).

158. *Giarratano v. Murray*, 668 F. Supp. 511 (E.D. Va. 1986), *rev'd*, 836 F.2d 1421 (4th Cir.), *aff'd on rehear'g*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 492 U.S. 1 (1989).

159. 430 U.S. 817 (1977).

160. *Id.* at 824.

161. *Id.* at 828.

162. *Giarratano*, 668 F. Supp. at 513. Judge Merhige based this conclusion on three factors: (1) "the limited amount of time death row inmates may have to prepare and present their petitions to the courts;" (2) "the complexity and difficulty of the legal work itself;" and (3) "at the time the inmate is required to rapidly perform the complex and difficult work necessary to file a timely petition, he is the least capable of doing so" because he is "preparing himself and his family for impending death." *Id.*

163. *Id.* at 515, 517. Virginia already had a statute under which counsel were appointed for state habeas petitioners who presented a nonfrivolous claim, but Judge Merhige found this to be insufficient. He reasoned that "the timing of the appointment is a fatal defect with respect to the requirement of *Bounds*. Because an inmate must already have filed his petition to have the matter of appointed counsel considered, he would not receive the attorney's assistance in the critical stages of developing



his claims." Judge Merhige therefore required Virginia to appoint counsel *before* the inmate filed a state habeas petition. *Id.* at 515.

164. *Id.* at 516.

165. *Giarratano v. Murray*, 836 F.2d 1421 (4th Cir.), *rev'd on rehear'g*, 847 F.2d 1118 (4th Cir. 1988) (*en banc*), *rev'd*, 492 U.S. 1 (1989). The panel affirmed the district court's ruling that the death row inmates did not have a right to appointment of counsel for assistance in preparing federal habeas petitions. *Id.* at 1427.

166. The district court provided this analysis of the assistance available from the institutional attorneys:

Currently there are seven institutional attorneys attempting to meet the needs of over 2,000 prisoners. No pretense is made by the defendants in this case that these few attorneys could handle the needs of death row prisoners in addition to providing assistance to other inmates. Although no institutional attorney has helped to prepare the habeas petition of a single death row inmate, the testimony at trial indicated that each attorney could not adequately handle more than one capital case at a time. Moreover, they are not hired to work full time; they split time between their private practice and their institutional work.

Even if Virginia appointed additional institutional attorneys to service death row inmates,

its duty under *Bounds* would not be fulfilled. The scope of assistance these attorneys provide is simply too limited. The evidence indicated that they do not perform factual inquiries of the kind necessitated by death penalty issues. They act only as legal advisors or, to borrow the phrase of one such attorney, as "talking lawbooks." Additionally, they do not sign pleadings or make court appearances.

For death row inmates, more than the sporadic assistance of a "talking lawbook" is required to enable them to file meaningful legal papers. With respect to these plaintiffs, the Court concludes that only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights provides them the meaningful access to the courts guaranteed by the Constitution.

668 F. Supp. at 514.

167. See *supra* notes 515, 517.

168. 836 F.2d at 1423.

169. 836 F.2d at 1425. The panel majority rejected the district court's grounds for concluding that mere access to a law library was insufficient to provide death row inmates with meaningful access to the courts. *Id.* at 1426-27.

170. *Giarratano v. Murray*, 847 F.2d 1119 (4th Cir. 1988) (en banc), *rev'd*, 492 U.S. 1 (1989). The en banc opinion was written by Judge Hall, who had dissented from the panel's

reversal of the district court. *Giarratano*, 836 F.2d at 1428 (Hall, J., dissenting).

171. 847 F.2d at 1122. The panel majority had followed *Finley*, noting, "We are concerned here with the identical type of proceeding addressed in *Finley*, state habeas corpus, on the heels of a clear and recent statement by the Supreme Court that there is no previously established constitutional right to counsel in state habeas corpus proceedings." 836 F.2d at 1424.

172. 847 F.2d at 1122.

173. *Id.* at 1122 n.8.

174. *Murray v. Giarratano*, 488 U.S. 923 (1988) (order granting certiorari).

175. *Murray v. Giarratano*, 492 U.S. 1 (1989) (plurality opinion).

176. *Id.* at 8.

177. *Id.* at 9-10. The plurality concluded:  
State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction

between the rights of capital case defendants and those in noncapital cases.

*Id.* at 10 (footnote omitted).

178. 492 U.S. at 12.

179. Justice O'Connor's concurring opinion noted:

[*Bounds*] allows the States considerable discretion in assuring that those imprisoned in their jails obtain meaningful access to the judicial process. Beyond the requirements of *Bounds*, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources. Our decision today rightly leaves these issues to resolution by Congress and the state legislatures.

*Id.* at 13 (O'Connor, J., concurring).

180. 492 U.S. at 14 (Kennedy, J., concurring in the judgment).

181. *Id.* at 14.

182. *Id.*

183. *Id.* (quoting *Bounds*, 430 U.S. at 833).

184. 492 U.S. at 14-15. For an analysis of Justice Kennedy's concurrence, see Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 53-54 n.189 (1990).

185. 492 U.S. at 15 (Stevens, J., dissenting).

186. *Id.* at 19-20. Justice Stevens pointed to the 60-to-70 percent success rate for federal habeas petitioners in capital cases and opined, "Such a high incidence of uncorrected error demonstrates that the meaningful appellate review necessary in a capital case extends beyond the direct appellate process." *Id.* at 24 (citing Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 520-21 (1988); John C. Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 REC. ASS'N B. CITY N.Y. 859, 873 (1987) (estimating that within the Eleventh Circuit, federal habeas petitioners succeed in one-third to one-half of all capital cases)). Justice Stevens also noted that in Virginia, postconviction proceedings were the first opportunity for the defendant to raise some issues, such as ineffective assistance of counsel. *Id.* at 24. Such postconviction proceedings "are the cornerstone for all subsequent attempts to obtain collateral review," he argued, because once a state court "determines that a claim is procedurally barred, a federal court may not review it unless the defendant can make one of two difficult showings: that there was both cause for the default and resultant prejudice, or that failure to review will cause a fundamental miscarriage of justice." *Id.* at 26.

The dissent also relied on the district court's finding that death row inmates are incapable of obtaining meaningful access to the courts through access to a prison law library. *Id.* at 27-28.

187. *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring).

188. ABA Background Report, *supra* note 28, at 90.

189. 111 S. Ct. 2546 (1991). Like *Giarratano*, Coleman was a Virginia death row inmate. Amid continuing controversy concerning his guilt or innocence, Coleman was electrocuted on May 20, 1992. Peter Applebome, *Virginia Execution Highlighted Politics of Death*, N.Y. TIMES, May 29, 1992, at B9. *Giarratano*, on the other hand, received a conditional pardon. See generally John F. Harris, *Terry Rules Out New Trial for Pardoned Killer*, WASH. POST, Feb. 21, 1991, at B3. The other two death row inmates named as parties in *Giarratano* were electrocuted. 259th *Electrocution Could Be Last One in Virginia History*, N.Y. TIMES, Mar. 5, 1994, at 6 (reporting Johnny Watkins' execution); *Virginia Executes Man for Murder*, N.Y. TIMES, July 21, 1990, at 9 (reporting Richard T. Boggs' execution).

190. 111 S. Ct. at 2566. Coleman's citation to *Giarratano* failed to note that *Giarratano* was a plurality opinion. *Id.*

191. *Id.* at 2567.

192. *Id.* at 2567.

193. See *supra* note 102 and accompanying text.

194. Despite the cause and prejudice standard's general narrowness, the Supreme Court has recognized that "[a]ttorney error that constitutes ineffective assistance of counsel is cause." Coleman, 111 S. Ct. at 2567; accord *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

195. 395 U.S. 683 (1969). *Noyd* held that in order to apply for habeas relief from the Article III judiciary, an incarcerated servicemember must first seek extraordinary relief from the Court of Military Appeals. *Id.* at 695-98. In an intriguing footnote, the Court commented that the servicemember need not seek extraordinary relief from the Air Force Board of Review because there had been no showing that the Boards of Review had power to issue writs. *Id.* at 698 n.11. The Boards' successors, the Courts of Military Review, do have such power. *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). The exhaustion requirement may now, therefore, encompass a request for extraordinary relief from the appropriate Court of Military Review as well.

196. The court has, for example, considered allegations of ineffective assistance of counsel that have never been raised before any military court in any context. One recent example is *Kennett v. Hart*, No. 90-3459-RDR, 1993 U.S. Dist. LEXIS 9648 (D. Kan. June 18, 1993). The court reasoned:

Although petitioner did not raise the issue of ineffective assistance of appellate counsel in the military courts, the court notes that collateral review is frequently the only means through which an accused can effectuate the right to counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986). A criminal defendant may be unaware that he has been incompetently represented until after trial or appeal. *Id.* The

court, consequently will address petitioner's claim of ineffective assistance of appellate counsel.

*Id.* at \*5. *But see* *Bramel v. Hart*, No. 91-3186-AJS, 1993 U.S. Dist. LEXIS 18600, at \*7 (D. Kan. Nov. 30, 1993) (refusing to review military petitioner's ineffective assistance of counsel claim raised for the first time on federal habeas).

In *Kimmelman*, however, before entering federal court, the petitioner sought postconviction relief from the New Jersey Superior Court. 477 U.S. at 371. Of course, there is no postconviction procedure in the military justice system. See *Polk*, 32 M.J. at 152. Nevertheless, the Court of Military Appeals has fashioned an alternative to the postconviction procedure. *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967) (allowing appellate military courts to order evidentiary hearings). In accordance with *Noyd*, the exhaustion requirement would appear to mandate that an incarcerated servicemember seek extraordinary relief from a military appellate court, which could then order a *DuBay* hearing if appropriate, before the servicemember seeks habeas relief in a federal district court.

197. The government may waive the exhaustion requirement. *Granberry v. Greer*, 481 U.S. 129 (1987). The court, however, can refuse to accept such a waiver. *Id.* The American Bar Association "encourages the states to have a publicly stated policy of waiving exhaustion in capital cases and encourages a willingness on the part of the federal courts generally to honor



such waivers." Criminal Justice Section Report, *supra* note 131, at 37 (footnotes omitted).

198. The district court and circuit court opinions in *Giarratano* also considered the right to counsel in federal habeas proceedings. See *supra* notes 164-165 and accompanying text.

199. See, e.g., *Brown v. Vasquez*, 952 F.2d 1164, 1168 (9th Cir., 1991), *cert. denied*, 112 S. Ct. 1778 (1992); *Hooks v. Wainwright*, 775 F.2d 1433, 1438 (11th Cir. 1985); *Williams v. Missouri*, 640 F.2d 140, 143 (8th Cir.), *cert. denied*, 451 U.S. 990 (1981); *Ardister v. Hopper*, 500 F.2d 229, 233 (5th Cir. 1974); *Hopkins v. Anderson*, 507 F.2d 530, 533 (10th Cir. 1974).

In *Giarratano*, both the district court and the Fourth Circuit Court of Appeals en banc rejected a constitutional right to federal habeas counsel while finding a constitutional right to counsel during state postconviction proceedings. *Giarratano*, 847 F.2d at 1122; *Giarratano*, 668 F. Supp. at 516-17.

200. 111 S. Ct. 1454 (1991).

201. *Id.* at 1470-71.

202. *Id.* at 1471 (quoting *Finley*, 481 U.S. at 555).

203. *Finley*, 481 U.S. at 557; see also *United States v. MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion).

204. *Gasquet v. Lapeyre*, 242 U.S. 367, 369 (1917) (ruling that "Section 9 of Article I, as has long been settled, is not restrictive of state, but only of national, action."); accord *Geach v. Olsen*, 211 F.2d 682 (7th Cir. 1954). See also *Harvey v. South Carolina*, 310 F. Supp. 83, 85 (D.S.C. 1970) (citing *Gasquet*

and *Geach* for the proposition that the Suspension Clause does not apply to the states, but deciding the case on other grounds).

The Department of Justice's Office of Legal Policy argued:

[T]he right to habeas corpus set out in the Constitution was only intended as a check on abuses of authority by the federal government, and was not meant to provide a judicial remedy for unlawful detention by state authorities. This point is evident, to begin with, from the placement of the Suspension Clause in Section 9 of Article I of the Constitution, which is an enumeration of limitations on the power of the federal government. The corresponding enumeration of restrictions on state authority in Section 10 of Article I contains no right to habeas corpus.

The same understanding was evident in the debate over the Suspension Clause at the constitutional convention. There was no dissent from the desirability of protecting the right to habeas corpus from federal interference, but the convention divided on whether a proviso should be stated to this general principle that would enable the federal government to suspend the writ in emergency situations. It was assumed in the debate at the convention that the states would remain free to suspend the writ even if the Suspension Clause were adopted in an unqualified form, and it was argued unsuccessfully that this made federal suspension power

unnecessary. Shortly after the ratification of the Constitution, the First Congress in 1789 made the restriction of the federal habeas corpus right to federal prisoners explicit . . . in the First Judiciary Act (ch. 14, § 20, 1 Stat. 81-82) . . . .

Office of Legal Policy, Dep't of Justice, Federal Habeas Corpus Review of State Judgments 5 (1988). See also AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, REPORT ON HABEAS CORPUS IN CAPITAL CASES, *reprinted in* 45 CRIM. L. REP. (BNA) 3239, at 3240 n.2 (Sept. 27, 1989) ("[T]he Constitution does not provide for federal habeas review of state court decisions. The writ of habeas corpus available to state prisoners is not that mentioned in the Constitution. It has evolved from a statute enacted by Congress in 1867, now codified at 28 U.S.C. § 2254.").

Justice Douglas noted that in spite of *Gasquet*, he "incline[d] to the view that this prohibition applies to the States as well as to the Federal Government." *California v. Alcorcha*, 86 S. Ct. 1359, 1361 (Douglas, Circuit Justice 1966).

205. U.S. CONST. art. I, § 9, cl. 2. This provision "is the only place in the Constitution in which the Great Writ is mentioned." CONSTITUTION OF THE UNITED STATES OF AMERICA, *supra* note 4, at 376.

206. *In re Yamashita*, 327 U.S. 1, 9 (1946). See also *Scaggs v. Larsen*, 396 U.S. 1206, 1208 (Douglas, Circuit Justice 1969).

207. 481 U.S. at 557.

208. 492 U.S. at 103.

209. 492 U.S. at 13 (O'Connor, J., concurring).

210. 492 U.S. at 9.

211. 492 U.S. at 14 (Kennedy, J., concurring). Justice Kennedy's opinion began, "It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Id.* He noted Justice Stevens' observation that "a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings" and added, "The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Id.*

212. *Oliver v. United States*, 961 F.2d 1339, 1343 (7th Cir.), *cert. denied*, 113 S. Ct. 469 (1992) (holding that an action under 28 U.S.C. § 2255 "is an independent civil suit for which there is no constitutional right to appointment of counsel"); *Rauter v. United States*, 871 F.2d 693, 695 (7th Cir. 1989). See also *United States v. Barnes*, 662 F.2d 777, 780 (D.C. Cir. 1980) (noting that "the Sixth Amendment does not apply to section 2255 proceedings, which are civil in nature.").

213. *Rauter*, 871 U.S. at 695.

214. *Id.* (quoting *Caruth v. Pinkney*, 683 F.2d 1044, 1048 (7th Cir. 1982) (*per curiam*), *cert. denied*, 459 U.S. 1214 (1983)).

215. *Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981).

216. See *infra* notes 339-340 and accompanying text. Interestingly, the Rules Governing Section 2255 Proceedings provide:

If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

R. GOV. § 2255 CASES IN U.S. DIST. CTS. 12. The Rules Governing Section 2254 Proceedings, on the other hand, provide: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." R. GOV. § 2254 CASES IN U.S. DIST. CTS. 11.

217. *McCleskey v. Zant*, 111 S. Ct. at 1471 (quoting *Finley*, 481 U.S. at 555).

218. UCMJ art. 27, 10 U.S.C. § 827.

219. UCMJ art. 70(c), 10 U.S.C. § 870(c).

220. *Id.*

221. The Senate's final passage of the Anti-Drug Act of 1988 occurred early in the morning of October 22, 1988. 134 CONG. REC. 32678. The bill's passage was literally the last

action before the 100st Congress adjourned *sine die*. *Id.* The rush to enact the legislation was so great that the bill "was not in print until after it had been approved." Marcia Coyle, *The Drug Bill's Secret Provision*, NAT'L L.J., Feb. 20, 1989, at 3, 22. President Reagan signed the bill into law on November 18, 1988. Remarks on Signing the Anti-Drug Abuse Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1521 (Nov. 18, 1988). The Supreme Court granted certiorari in *Giarratano* on October 31, 1988. 488 U.S. 923 (1988).

222. 21 U.S.C.A. § 848(e) (West Supp. 1993).

223. 21 U.S.C.A. § 848(q) (West Supp. 1993).

224. 21 U.S.C.A. §848(q)(10) (West Supp. 1993).

225. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL DEFENDER SERVICES: A STATUS REPORT 2 (1993).

226. 21 U.S.C.A. § 848(q)(5), (6) (West Supp. 1993).

227. 28 U.S.C. § 2255 (1988).

228. LARRY W. YACKLE, POSTCONVICTION REMEDIES 154 (1981).

Before 1948, 28 U.S.C. § 2241 served as federal prisoners' avenue for postconviction proceedings. That system, however, proved undesirable because prisoners filed their petitions in the district court having jurisdiction over their confinement facility.

That, of course, meant the court nearest the institution where the prisoner was confined. In rather short order, district courts sitting next to large federal penitentiaries were swamped with applications.

At the same time, district courts sitting elsewhere rarely heard from a prisoner after sentencing. Not only did courts near institutions receive more than their share of cases, but the fair disposition of those cases was often difficult. At a minimum, the federal habeas court had to obtain the files and records of the cases from the trial court. When evidentiary hearings were necessary, witnesses, perhaps including the trial judge, were often forced to travel great distances in order to testify.

YACKLE, *supra*, at 153. "[T]he motion under section 2255 has essentially displaced habeas corpus as a collateral remedy for constitutional error in federal criminal prosecutions." *Id.* at 154. See generally LIEBMAN, *supra* note 154, at ch. 36.

229. United States v. Soriano, 20 M.J. 337, 341 (C.M.A. 1985) ("A court-martial is not the personal feifdom of the trial judge but is a court established by Act of Congress."); *but see* Newsome v. McKenzie, 22 C.M.A. 92, 93, 46 C.M.R. 92, 93 (1973) (Duncan, J., dissenting) ("Inasmuch as courts-martial, while authorized by legislative enactment, are established by order of military commanders, it may be argued that these courts are not courts established by act of Congress . . . .").

18 U.S.C. § 3568 supports the proposition that a court-martial is a court established by Act of Congress. That statute includes this definition: "As used in this section, the term 'offense' means any criminal offense, other than an offense

triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress." 18 U.S.C. § 3568 (1988). If Congress did not include courts-martial within the class of courts established by Act of Congress, then it would have been unnecessary to specifically exclude military tribunals from the statute's scope.

See also *Krause v. United States*, 7 M.J. 427, 429 (C.M.A. 1979) (Perry, J., dissenting) (opining that 28 U.S.C. § 2255 provides the Court of Military Appeals authority to provide postconviction relief); *United States v. Armes*, 42 C.M.R. 438 (A.C.M.R. 1970) (holding that 28 U.S.C. § 2255 does not give the Army Court of Military Review jurisdiction to order relief including a medical discharge and a determination of a service-connected disability).

230. 28 U.S.C. § 2255 (1988).

231. MCM, *supra* note 19, R.C.M. 1102(d).

232. See Millemann, *supra* note 133, at 503 (noting, "The Act also provides, somewhat enigmatically, that 'in every criminal action in which a defendant is charged with a crime which may be punishable by death,' an indigent defendant is entitled to the appointment of counsel whether the need arises before or after judgment.").

233. 1988 U.S.C.C.A.N. 5937 (1988). See also Coyle, *supra* note 221 (describing the development of the Anti-Drug Abuse Act's counsel provisions).



234. 134 CONG. REC. 22,995 (1988).

235. *Id.* at 22,996-97.

236. *Id.* at 22,997.

237. *Wainwright v. Norris*, 836 F. Supp. 619 (E.D. Ark. 1993).

238. Other cases have rejected state death row inmates' attempts to secure federally-funded counsel during state postconviction review through 21 U.S.C. § 848(q)(4)(B). *See, e.g., Hill v. Lockhart*, 992 F.2d 801 (9th Cir. 1993); *In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989).

239. 836 F. Supp. 619 (E.D. Ark. 1993).

240. *Wainwright*, 836 F. Supp. at 621 (alteration in the original). After expressing great concern over Arkansas' failure to ensure appointment of counsel for death row inmates during postconviction review and praising the two counsel involved for their performance, the district court ruled that it did "not have the authority to provide a monetary remedy for the state's omission by providing federal funding for state procedures." *Id.* at 623-24. The court did, however, "authorize payment for all the work conducted for the federal habeas petition." *Id.* at 624.

241. Memorandum from Administrative Office of the U.S. Courts to All Judges & Clerks (Apr. 14, 1989) (quoted in Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 318 n.141 (1991)).

242. U.S. CONST. art. I, § 8, cl. 14.

243. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990). See generally 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992).

244. Under the *Norris* court's interpretation, both subsections would provide for the appointment of counsel for a federal death row inmate pursuing a 28 U.S.C. § 2255 postconviction proceeding.

245. 18 U.S.C. § 3006A (1988). See Vivian Berger, *Justice Delayed or Justice Denied?--A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1678 (1990); see generally Arthur W. Ruthenbeck, *You Don't Have to Lose Your Shirt on Death Penalty Cases*, CRIM. JUST., Spring 1988, at 10. The Tenth Circuit Court of Appeals has held that habeas counsel will not be appointed under the Equal Access to Justice Act. *Ewing v. Rodgers*, 826 F.2d 967 (10th Cir. 1987).

246. 18 U.S.C. § 3006A(a)(2)(B).

247. 18 U.S.C. § 3006A(2).

248. Ruthenbeck, *supra* note 245, at 42.

249. R. GOV. § 2254 CASES IN U.S. DIST. CTS. 6(a); R. GOV. § 2255 CASES IN U.S. DIST. CTS. 6(a).

250. R. GOV. § 2254 CASES IN U.S. DIST. CTS. 8(c); R. GOV. § 2255 CASES IN U.S. DIST. CTS. 6(a).

251. R. GOV. § 2254 CASES IN U.S. DIST. CTS. 1(b).

252. Liebman, *supra* note 154, at 170.

253. See, e.g., *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987) (holding that

federal district court did not abuse its discretion in denying state death row inmate's request for appointed counsel for federal habeas review, but ordering appointment of counsel on remand in view of the increased "complexities of the issues with which the district court must deal on remand" and "the fact that this is a death penalty case"). In one such case, however, the Eighth Circuit Court of Appeals ruled that the denial of counsel in a habeas review of a capital case constituted an abuse of discretion. *Battle v. Armontrout*, 902 F.2d 701, 702 (8th Cir. 1990).

254. 18 U.S.C.A. § 3006A(d)(1) (West Supp. 1993).

255. 18 U.S.C.A. § 3006A(d)(1) (West Supp. 1993). The Administrative Office of U.S. Courts notes, "Because of insufficient funds in the judiciary's Defender Services appropriation, alternative rates (above the \$60/\$40 rate) are being paid in only 16 districts, and increases based on federal cost-of-living increases have not been implemented at all." ADMINISTRATIVE OFFICE OF COURTS, *supra* note 225, at 2.

256. 18 U.S.C.A. § 3006A(d)(2). This is the Eighth Circuit's interpretation of the statutory maximum. See *Hill v. Lockhart*, 992 F.2d 801, 802 n.2 (8th Cir. 1993) ("attorneys appointed in death cases were subject to a \$2500 statutory fee maximum under the Criminal Justice Act of 1964."); see also *Simmons v. Lockhart*, 931 F.2d 1226, 1227 (8th Cir. 1991) (per Arnold, J., sitting as single circuit judge) ("The old law, the Criminal Justice Act of 1984, fixed hourly rates and a statutory

maximum of \$2,500 (waivable in certain circumstances), as well as allowing reimbursement for certain 'expenses reasonably incurred' in certain federal criminal cases, including capital cases.").

257. 18 U.S.C.A. § 3006A(d)(2).

258. 18 U.S.C.A. § 3006(d)(2). See *Martin v. Dugger*, 708 F. Supp. 1265, 1266 (S.D. Fla. 1989) ("Section 3006A(d)(2) provides that each attorney may not recover more than \$750.00 for representation in the collateral proceeding, but the court may waive that amount for extended or complex representation, see 18 U.S.C. § 3006a(D)(3)."); accord *United States ex rel. Kubat v. Thieret*, 690 F. Supp. 725, 725 (N.D. Ill. 1988) (noting that "compensation for representation in a habeas case may not exceed \$750 per attorney unless certain prerequisites are met."). See also *Liebman*, *supra* note 154, at 174-75 (indicating that the \$750 maximum applies).

Because the \$750 cap applies per proceeding, under this interpretation a counsel could receive \$750 for representing a habeas petitioner before the district court and another \$750 for appealing the same petitioner's case.

259. 18 U.S.C. § 3006A(d)(3).

260. *Id.*

261. *Id.*

262. As of April 1, 1994, however, the Kansas legislature was actively considering a death penalty statute and the state's governor, though herself a death penalty opponent, promised to allow it to become law. Lori Montgomery, *Reacting to Public*

*Outrage, U.S. Becoming the Executioner*, HOUSTON CHRON., Apr. 1, 1994, at A10.

263. Letter from Janine Cox, pro se clerk, United States District Court, District of Kansas, to author, (Dec. 19, 1993) (on file with author); Letter from Janine Cox, pro se clerk, United States District Court, District of Kansas, to author, (Jan. 25, 1994) (on file with author).

The district received 14 petitions from United States Disciplinary Barracks prisoners during calendar year 1991, 19 during calendar year 1992, and 19 from January 1 to November 19, 1993. The figure for the total number of requests for counsel reflects the entire calendar year for 1993.

264. *Id.*; see also *Jefferson v. Berrong*, 783 F. Supp. 1304, 1305 n.1 (D. Kan. 1992), *appeal dismissed sub nom. Amen-Ra v. Berrong*, 992 F.2d 1222 (1993) (denying petitioner's request for counsel).

265. The one case in which the petitioner was represented by counsel was *Lips v. Commandant, U.S. Disciplinary Barracks*. See *supra* notes 95-99 and accompanying text.

266. See, e.g., *Wolff v. United States*, 737 F.2d 877, 877 (10th Cir. 1984) (referring to Colorado federal district court's appointment of counsel for petitioner).

267. *Mercer v. Armontrout*, 864 F.2d 1429, 1433 (8th Cir. 1988).

268. This section assumes that a policy decision to appoint counsel would be carried out by statute or court rule, not by a

revision of current Supreme Court case law. The mechanism used to implement the policy is important because a constitutional right to appointed counsel would create a right to effective assistance of such counsel. Coleman, 111 S. Ct. at 2566.

269. See, e.g., Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 26 (1987); David C. Hoffman, *Attack on Big Mac? McComber: A Counsel Right*, ARMY LAW., Aug., 1988, at 16.

270. Francis A. Gilligan & Michael D. Wims, *Civilian Justice v. Military Justice*, CRIM. JUST., Summer 1990, at 2, 34.

271. Cf. Millemann, *supra* note 133, at 482 ("In the vast majority of criminal appeals, resolution of issues will not have life and death consequences. It *always* will have such consequences in capital post-conviction proceedings. Yet there is a constitutional right to counsel in *all* direct appeals from criminal convictions in noncapital as well as capital cases.").

272. Mercer, 864 F.2d at 1433.

273. Millemann, *supra* note 133, at 479. Professor Millemann made this comment in the context of state capital postconviction proceedings. Nevertheless, it is equally applicable to federal habeas reviews of military capital cases.

274. Robinson, *supra* note 126, at 4(c). The same data are analyzed in Karen M. Allen, Nathan A. Schachtman & David R. Wilson, *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675 (1982).

275. Robinson, *supra* note 126, at 4(c). Professor Robinson found that court-appointed counsel

were successful in 17.5% of their cases compared to 7.9% for retained counsel and 8.3% for clinic or prison project counsel. The higher success rate for court appointed counsel may reflect the fact that the court appoints counsel only for the more meritorious petitions. However, even in the group of cases in which counsel was privately retained or was provided by a clinic or prison project, the success rate was dramatically higher than for pro se filers.

*Id.*

The greater rate of success for those represented by counsel may be due in part to counsel performing a "screening function." *Id.* at 62. Obviously, no such screening is likely to occur in collateral reviews of death penalty cases.

276. *Id.* at 58. Professor Robinson noted that "[i]n all types of districts and for all types of filers, those with counsel were more likely to have a favorable disposition than those without representation." *Id.* at 59. The study also revealed that "[i]n addition to a greater likelihood of ultimate success, petitioners with counsel are more likely than the average petitioner to get a hearing of some sort in the district court, to have an opinion written by the district court, to have the court of appeals hear argument on appeal, write an opinion on appeal, and dispose of the case faster." *Id.* at 60.

277. *Empirical Light*, supra note 14, at 707. The researchers studied half of all habeas cases filed in the United States District Court for the Southern District of New York from 1973-1975 and 1979-1981. *Id.* at 669-70.

278. *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the result).

279. *Millemann*, supra note 133, at 483. *See also id.* at 500-05 (discussing the state interest in providing counsel).

280. *See Giarratano*, 492 U.S. at 24-25 (Stevens, J., dissenting). Justice Stevens notes postconviction proceedings may reveal new evidence that suggests "the defendant is innocent." As examples, he cites *Ex parte Adams*, No. 70,787 (Tex. Cr. App., Mar. 1, 1989) (the case about which *The Thin Blue Line* was made) and *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989), where the Fourth Circuit Court of Appeals granted habeas relief in a death penalty case due to the prosecutor's failure to disclose exculpatory evidence. In that case, the prosecution did not reveal that the sole eyewitness to the murder initially indicated that the killer was a white male, when the accused was a black male.

281. Michael A. Mello, *Is There A Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065, 1081 (1989) (emphasis omitted).

282. *Military Lawyers*, NAT'L L.J., Feb. 28, 1994, at 24 (quoting letter from Representative Edwards to Secretary of Defense Les Aspin).



283. 499 U.S. 467 (1991).

284. The Supreme Court left a narrow exception to the cause and prejudice standard where barring the subsequent petition would create a fundamental miscarriage of justice. *Id.* at 494.

285. ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 225, at 3.

286. *Id.* at 2.

287. Robinson, *supra* note 126, at 60.

288. United States v. Gray, 32 M.J. 730, 735-36 (A.C.M.R.), *petition denied*, 34 M.J. 164 (C.M.A. 1991).

289. Criminal Justice Section Report, *supra* note 131, at 10. The Criminal Justice Section reported this recommendation to the House of Delegates, which adopted it as ABA policy. *See id.* at 9 n.\*.

290. UCMJ art. 70(e), 10 U.S.C. § 870(e).

291. 18 U.S.C.A. § 205 (West Supp. 1993). *See generally* Carolyn Elefant, *Section 205's Restrict on Pro Bono Representation by Federal Attorneys*, 37 FED. B. NEWS. & J. 407, 407-08 (1990); Roswell B. Perkins, *The New Federal Conflict of Interest Law*, 76 HARV. L. REV. 1113 (1963).

292. 18 U.S.C.A. § 205(a). *See* 1 Op. Off. Legal Counsel 110, 111 (1977) (concluding that temporarily assigning an Assistant U.S. Attorney as an assistant Federal Public Defender under an exchange program falls within the section's "official duties" exception); 4B Op. Off. Legal Counsel 498, 503-05 (1980) (concluding that detailing Environmental Protection Agency employees to positions in state agencies that "have frequent

substantive contacts [with EPA] of an adversary sort" falls within the section's "official duty" exception); 16 Op. Att'y Gen. 478 (1880) (concluding that 18 U.S.C. § 205's predecessor prohibited an officer in the bureau of military justice from acting as counsel for another Army officer before the Court of Claims).

293. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE App. C (22 Dec. 89).

294. The regulation notes, "There guidelines have been approved by TJAG. Military personnel who act in courts-martial, including all Army attorneys, will apply these principles insofar as practicable." *Id.* at NOTE.

295. *Id.* at c (the regulation misdesignated this subsection as (c)).

296. *Id.* at c(1).

297. *Id.* at c(2). The guidelines continue, "[N]othing prohibits the military defense counsel's explaining to the accused the right to retain civilian counsel in the matter." *Id.* However, the Guidelines add:

Military counsel would be acting contrary to the spirit of AR 27-40 if he or she acted through civilian counsel to perform a service for the client that military counsel could not perform on his or her own (e.g., preparation of pleadings in habeas corpus proceedings) and should not do so.

*Id.* at c(3).

298. DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION, para 1-6 (2 Dec. 1987). The regulation provides an exception to this policy if: "(1) The appearance is specifically authorized herein[;] (2) The individual is a party to the action or proceeding[; or] (3) The appearance is authorized under an Expanded Legal Assistance Program (AR 27-3)." Id. at para 1-6a.

299. *Bennett v. Cox*, 287 F.2d 883 (10th Cir. 1961).

300. Letter from J. L. Williams to the Judge Advocate General of the Army (Mar. 16, 1961) in Bennett Record, *supra* note 3. Mr. Williams was an attorney from Danville, Virginia, near Bennett's home town. Memorandum from Chief, Litigation Division to Chief, Military Justice Division (Apr. 6, 1960), in Bennett Record, *supra* note 3. During habeas review, Bennett was also represented by Elisha Scott, a prominent civil rights attorney who had filed the original suit in *Brown v. Board of Education*. See MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 154 (1994). Mr. Scott also represented three other condemned servicemembers in a habeas action. *Suttles v. Davis*, 215 F.2d 760 (10th Cir.), *cert. denied*, 348 U.S. 903 (1954). Like Bennett's, the habeas action was unsuccessful and the three were hanged. *Soldiers to Death on Gallows*, LEAVENWORTH TIMES, Mar. 1, 1955, at 1.

301. Memorandum for Record, Major General Charles L. Decker (Mar. 24, 1961) in Precedent File Copies of DA General Court-Martial Orders, etc., Death Cases (on file at the Judge Advocate General's School, U.S. Army, library) [hereinafter Precedent

File]. The memorandum for record explained the reasons for this decision:

Although President Eisenhower approved the death sentence for Bennett in 1957, the new President may now consider the case and exercise clemency, if he so desires, in behalf of Bennett. The case is, therefore, closely associated with the appellate processes provided in Article 71, UCMJ. Based upon this special situation wherein President Kennedy may review the action of his predecessor, I decided that the services of a judge advocate officer for Bennett and his civilian attorney are appropriate.

*Id.* The detailed appellate defense counsel had not represented PFC Bennett at the Court of Military Appeals, which had resolved Bennett's case five years earlier. *United States v. Bennett*, 7 C.M.A. 97, 21 C.M.R. 223 (1956).

A White House Fact Sheet dated 23 March 1961 indicated that an appellate defense counsel had been assigned and "is now collaborating with Mr. Williams in the preparation of a clemency petition in behalf of Bennett." White House Fact Sheet signed by Brigadier General Alan B. Todd (23 Mar. 1961) in Precedent File, *supra*. President Kennedy denied the request for clemency. See *supra* note 3.

302. Criminal Justice Section Report, *supra* note 131, at 25. Another recommendation provides that "[n]ew counsel should be appointed to represent the death-sentenced inmate for the

state direct appeal unless the appellant requests the continuation of trial counsel after having been fully advised of the consequences of his or her decision, and the appellant waives the right to new counsel on the record." *Id.* at 9-10. This is designed to result in new counsel being "appointed before the commencement of post-conviction litigation, so that any claims of ineffectiveness will be presented in the first petition." *Id.* at 24. In the military, because appellate defense counsel must be assigned to the Office of the Judge Advocate General, UCMJ art. 70(a), 10 U.S.C. § 870(a), new counsel is almost invariably appointed on appeal. Gilligan & Lederer, *supra* note 13, § 25-41.00.

303. A supplement is a brief asking the Court of Military Appeals to exercise its discretionary jurisdiction to hear a case. See U.S.C.M.A. R. 21; see generally Eugene R. Fidell, *Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals*, 131 MIL. L. REV. 169, 253-65 (1991). It functions much like a petition for certiorari.

304. Robinson O. Everett, *Specified Issues in the United States Court of Military Appeals: A Rationale*, 123 MIL. L. REV. 1, 4 (1989).

305. *United States v. Gray*, \_\_\_ M.J. \_\_\_, No. 93-7001/AR (C.M.A. Dec. 20, 1993).

306. *Id.* at 2.

307. Brief for Appellant at 250-51, *United States v. Curtis*, 38 M.J. 530 (N.M.C.M.R. 1993) (en banc), *appeal docketed*,

No. 94-7001/MC (C.M.A. Oct. 15, 1993). I am one of these seven counsel.

308. Fidell, *supra* note 303, at 225.

309. *Military Lawyers*, *supra* note 282 (quoting letter from Representative Edwards to Secretary of Defense Les Aspin).

310. Crim. Justice Section Report, *supra* note 131, at 25.

311. AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES at Guideline 5.1(III)(iii) (1989).

312. *You Don't Have to Be a Bleeding Heart*, HUM. RTS., Winter 1987, 22, 24 (quoting Judge John C. Godbold). See also John C. Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 ASS'N B. CITY N.Y. 859, 863 (1987) (noting, "Habeas corpus is as unfamiliar to a lot of lawyers as atomic physics.").

313. See Crim. Justice Section Report, *supra* note 131, at 21 n.16 ("On-the-job training in the individual case . . . should not be the type of experience that the law contemplates.").

314. Cf. *Still a Crisis: Lawyers Needed in Capital Cases*, A.B.A.J., Apr. 1989, at 23 (quoting lawyer stating that a civil lawyer handling a death penalty case is like "asking a podiatrist to do brain surgery. But if we don't do it, who will?").

315. 18 U.S.C.A. § 3006A (West Supp. 1993).

316. 18 U.S.C. § 3006A(a)(2).

317. "The Federal Public Defender Organization for the District of Kansas was established in 1973 . . . . The Federal Public Defender Organization is to be headquartered in Wichita,

Kansas, with branch offices in Topeka, and Kansas City, Kansas, and capable of rendering defense services on appointment throughout the district." U.S. DIST. CT. DIST. OF KAN. R. 301. See generally 18 U.S.C.A. § 3006A(g)(2)(A).

318. U.S. DIST. CT. DIST. OF KAN. R. 301(b), (d)(1). The rule provides that "[i]nsofar as practicable, panel attorney appointments will be made in at least 25 percent of the cases." *Id.* The Criminal Justice Act requires that private attorneys "be appointed in a substantial proportion of the cases." 18 U.S.C.A. § 3006A(a)(3). To be part of the CJA Panel, attorneys must apply to a Panel Selection Committee, which will "approve for membership those attorneys who appear best qualified." U.S. DIST. CT. DIST. OF KAN. R. 301(e)(2).

319. See *supra* note 262.

320. U.S. DIST. CT. DIST. OF KAN. R. 301(a). Subsection (b) of the Criminal Justice Act applies to those seeking habeas relief under 28 U.S.C. § 2241.

321. 18 U.S.C. § 3006A(a)(3).

322. U.S. DIST. CT. DIST. OF KAN. R. 301(d)(2). Panel attorneys must also "have demonstrated experience in, and knowledge of, the Federal Criminal Law, Federal Rules of Criminal Procedure and the Federal Rules of Evidence." *Id.*

323. U.S. DIST. CT. DIST. OF KAN. R. 402(a). Additionally, "Persons who are holders of a temporary permit to practice law granted by the Supreme Court of Kansas may apply for a temporary permit to practice in this court." *Id.* at (d).

324. In addition to having a general familiarity with the military justice system, counsel should be familiar with the military's extraordinary relief procedures, as counsel may have to use such procedures to exhaust remedies before bringing some claims in a federal habeas action.

325. U.S. DIST. CT. DIST. OF KAN. R. 301(f)(2). The plan provides that normally, "Appointments from the CJA Panel rosters are to be made on a rotational basis, subject to the court's discretion to make exceptions due to the nature and complexity of the case, the attorney's experience, and language and geographical considerations." *Id.*

326. *See generally id.* at R. 404.

327. "Death-penalty resource centers are specialized community defender organizations that provide direct representation in some death-penalty cases and encourage private attorneys to accept assignments in others by offering them training and expert advice." Administrative Office of Courts, *supra* note 225, at 2. As of August 1993, there were 19 death penalty resource centers serving 47 districts. *Id.*

328. "The project advises federal public defenders on capital-punishment issues." Eva M. Rodriguez, *Reno's Death-Penalty Record*, LEGAL TIMES, Feb. 28, 1994, at 6.

329. *Dobbs v. Kemp*, No. 4:80-cv-247-HLM, 1989 U.S. Dist. LEXIS 10674, \*3 (N.D. Ga. April 26, 1989). The court set a \$95 hourly rate for compensation under the Anti-Drug Abuse Act. *Id.* at \*10.



330. ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 225, at 3.

331. 21 U.S.C.A. § 848(e). However, no death penalty cases have been brought in the District of Kansas. House Subcommittee on Civil and Constitutional Rights, Racial Disparities in Federal Death Penalty Prosecutions 1988-1994 at Appendix (March 1994) (unpublished report) (on file with House Subcommittee on Civil and Constitutional Rights).

332. *United States v. Cooper*, 746 F. Supp. 1352, 1352 (N.D. Ill. 1990).

333. 21 U.S.C.A. § 848(q)(10).

334. Compare 21 U.S.C. § 848(q)(10) with 18 U.S.C.A. § 3006A(e)(3) (West Supp. 1994) (establishing a \$1,000 maximum on fees to be paid to one individual for non-legal services). The Criminal Justice Act's maximum amount can be waived, however, upon certification by the court and approval by the chief judge of the circuit.

335. 21 U.S.C.A. § 848(q)(8).

336. 21 U.S.C.A. § 848(q)(5), (6).

337. The qualification provision indicates that "[i]f the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases." 21 U.S.C. § 848(q)(6). For good cause, however, a court can appoint counsel who does not meet this requirement. *Id.* at 848(q)(7).

338. 21 U.S.C.A. § 848(q)(7). The Eleventh Circuit rejected an argument that the phrase "appoint another attorney" meant that the court could appoint a second attorney, not that the court could appoint such an attorney instead of one qualified under the standards. In re Lindsey, 875 F.2d 1502, 1507 n.3 (11th Cir. 1989) (construing subsection (q)(7)). The provision's legislative history supports the Eleventh Circuit's interpretation. See 134 Cong. Rec. H7284-85 (daily ed. Sept. 8, 1988).

339. Hilton v. Braunskill, 481 U.S. 770, 775 (1987). But see Harris v. Nelson, 394 U.S. 286, 293-94 (1969) (contending that while "habeas corpus proceedings are characterized as 'civil,'" that "label is gross and inexact.").

340. Fed. R. Civ. Pro. 81(a).

341. AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES at Guideline 5.1(III) (1989) (emphasis added). See also NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES at Standard 5.1 (1988). The American Bar Association House of Delegates recommended adoption of the Guidelines subject to such exceptions as may be appropriate in the military. ABA Guidelines, *supra*, at ii.

342. 21 U.S.C.A. § 848(q)(6).

343. 3 The Writings of George Washington 13 (ed. Jared Sparks 1834) (from Answer to an Address of the New York Provincial Congress, 26 June 1775).

344. Indeed, in *Burns v. Wilson*, the Supreme Court did precisely that.

345. *Lips v. Commandant, U.S. Disciplinary Barracks*, 114 S. Ct. 920 (1994).

346. *Solorio v. United States*, 483 U.S. 435, 447 (1987).

347. *Schlesinger v. Councilman*, 420 U.S. 738, 50 (1975).

348. Rosen, *supra* note 13, at 9. Professor Rosen continued, "On the other hand, federal judges are the final arbiters of federal constitutional law. They should be afforded a role in the resolution of constitutional claims raised in collateral attacks on courts-martial beyond merely ascertaining whether the military courts considered the claims." *Id.*

349. Noyd, 395 U.S. at 695 (observing that the "primary responsibility for the supervision of military justice in this country and abroad" rests with the Court of Military Appeals). Interestingly, the House Armed Services Committee's report on the Uniform Code of Military Justice noted that the Court of Military Appeals would serve as "the court of last resort for court-martial cases, except for the constitutional right of habeas corpus." H.R. REP. NO. 491, 81st Cong., 1st Sess. 7 (1949).

350. The Supreme Court's rules suggest that certiorari is appropriate where "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." SUP. CT. R. 10.1. After listing several other bases for certiorari, the rule adds, "The same general considerations outlined above will control in

respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals." *Id.* at R. 10.2. The leading treatise on Supreme Court practice notes, "When there is a direct conflict between a decision of one of the 12 regional courts of appeals and a decision of either the Court of Appeals for the Federal Circuit or the Court of Military Appeals, there is a basis for Supreme Court review of either decision by way of certiorari." SUPREME COURT PRACTICE, *supra* note 29, at 206. The treatise also advises:

The Supreme Court often, *but not necessarily*, will grant certiorari where the decision of a federal court of appeals, as to which review is sought, is in direct conflict with a decision of another court of appeals on the same matter of *federal* law or on the same matter of *general* law as to which federal courts can exercise independent judgments. . . . [A] square and irreconcilable conflict of this nature *ordinarily* should be enough to secure review.

*Id.* at 168. In *Davis v. United States*, 114 S. Ct. 379 (1993), the Supreme Court granted certiorari in a military case to resolve a split among the circuits concerning the Fifth Amendment's requirements when a suspect makes an ambiguous request for counsel.

351. Cf. Robert M. Cover & T. Alexander Aleinkoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977) (arguing that federal habeas review of state

criminal cases serves as a dialogue between the federal and state judiciaries).

352. The Supreme Court has emphasized that "judicial deference" to "congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

353. *Weiss v. United States*, 114 S. Ct. 752, 760 (1994) (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)) (emphasis added).

354. The Supreme Court has explained that while an unequal distribution of state benefits is subject to equal protection scrutiny, "[g]enerally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose." *Zobel v. Williams*, 457 U.S. 55, 60 (1982).

355. *United States v. Gallagher*, 15 C.M.A. 391, 398, 35 C.M.R. 363, 370 (1965). Article 67(a), 10 U.S.C. § 867, provides:

The Court of Military Appeals shall review the record in--

(1) all cases in which the sentence, as affirmed by a Court of Military Review, extends to death;

(2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and

(3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

Article 71(a), 10 U.S.C. § 871, provides, "No court-martial sentence extending to death or involving a general or flag officer may be executed until approved by the President." Thus, appellants whose death sentences are affirmed by a Court of Military Review are the only accused who fall within the Court of Military Appeals' mandatory jurisdiction. When originally enacted, the Uniform Code of Military Justice provided mandatory jurisdiction in the case of general and flag officers, as well. While Gallagher upheld that provision as well, the Military Justice Act of 1983 eliminated it from the Code.

As Justice Stevens' *Giarratano* dissent observed, "Legislatures conferred greater access to counsel on capital defendants than on persons facing lesser punishment even in colonial times." 492 U.S. at 20 (Stevens, J., dissenting).

356. See generally Marcia Coyle, *Crime Bill Faces Old Barriers*, NAT'L L.J., Aug. 30, 1993, at 10; *Habeas Redux*, NAT'L L.J., May 20, 1991, at 31; *Congress Wraps It Up*, NAT'L L.J. Nov. 12, 1990, at 1.

357. 483 U.S. 435 (1987).

358. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 188 (1962).

## APPENDIX A

### A BILL

To amend Chapter 47 of title 10, United States Code  
(the Uniform Code of Military Justice), to  
establish parity between habeas corpus review of  
state and military capital cases

*Be it enacted by the Senate and House of Representatives of  
the United States of America in Congress assembled,*

#### **SECTION 1. SHORT TITLE**

This Act may be cited as the "Military Capital Habeas Corpus  
Equality Act."

#### **SEC. 2. PROVISION OF COUNSEL; SCOPE OF REVIEW**

(a) IN GENERAL.--Chapter 47 of Title 10, United States Code,  
is amended by adding the following new section:

**"§ 871a. Art. 71a. Habeas corpus review of capital courts-  
martial.**

"(a) In any case where the President, acting under section  
871(a) of this title (article 71(a)), approves the sentence of a  
court-martial extending to death, an accused who is or becomes  
financially unable to obtain adequate representation or  
investigative, expert, or other reasonably necessary services in  
any proceeding under section 2241 of Title 28, United States  
Code, seeking to vacate or set aside the death sentence shall be  
entitled to appointment of counsel and the furnishing of other  
services to the same extent as would a defendant in any post

conviction proceeding under section 2254 of Title 28, United States Code, seeking to vacate or set aside a death sentence.

"(b) In any case where the President, acting under section 871(a) of this title (article 71(a)), approves the sentence of a court-martial extending to death, the Federal courts, in reviewing an application under section 2241 of title 28, United States Code, shall apply the same scope of review as would be used to review an application under section 2254 of title 28, United States Code, seeking to vacate or set aside a death sentence."

(b) TECHNICAL AMENDMENT.--The table of sections at the beginning of subchapter IX of Chapter 47 of title 10, United States Code, is amended by inserting after the item relating to section 871 (article 71) the following new item:

"871a 71a. Habeas corpus review of capital courts-martial.".

**SEC. 3. EFFECTIVE DATE.**

This Act shall apply to cases pending on or commenced on or after the date of the enactment of this Act.



## APPENDIX B

During 1992 and 1993, the United States District Court for the District of Kansas decided the following cases in which habeas corpus petitioners challenged their court-martial conviction, sentence, convening authority's action, and/or appeal.

1. Castillo v. Hart, No. 91-3215-AJS, 1993 U.S. Dist. LEXIS 18609 (D. Kan. Dec. 17, 1993)

2. Bramel v. Hart, No. 91-3186-AJS, 1993 U.S. Dist. LEXIS 18600 (D. Kan. Nov. 30, 1993)

3. Fatcher v. Hart, No. 91-3137-AJS, 1993 U.S. Dist. LEXIS 17205 (D. Kan. Nov. 9, 1993)

4. DuBose v. Hart, No. 91-3149-AJS, 1993 U.S. Dist. LEXIS 17204 (D. Kan. Nov. 9, 1993)

5. Boos v. U.S. Disciplinary Barracks Commandant, No. 93-3132-RDR, 1993 U.S. Dist. LEXIS 15607 (D. Kan. Oct. 29, 1993)

6. Goltz v. Commandant, U.S.D.B., No. 92-3051-RDR, 1993 U.S. Dist. LEXIS 15576 (D. Kan. Oct. 29, 1993)

7. Bartos v. U.S. Disciplinary Barracks, No. 91-3135-AJS, 1993 U.S. Dist. LEXIS 15593 (D. Kan. Oct. 18, 1993)

8. Goff v. Hart, No. 91-3130-AJS, 1993 U.S. Dist. LEXIS 14032 (D. Kan. Sept. 29, 1993)

9. Travis v. Hart, No. 92-3011-RDR, 1993 U.S. Dist. LEXIS 10911 (D. Kan. July 13, 1993), aff'd, 16 F.3d. 417 (10th Cir. 1994) (table)

10. Kennett v. Hart, No. 90-3459-RDR, 1993 U.S. Dist. LEXIS 9648 (D. Kan. June 18, 1993)

11. Smith v. Hart, No. 90-3361-RDR, 1993 U.S. Dist. LEXIS 7254 (D. Kan. May 14, 1993)

12. Reed v. Hart, No. 90-3428-RDR, 1993 U.S. Dist. LEXIS 7395 (D. Kan. May 10, 1993), aff'd, No. 93-3154 (10th Cir. Mar. 1, 1994)

13. Lomax v. Hart, No. 90-333-RDR, 1993 U.S. Dist. LEXIS 6370 (D. Kan. Apr. 12, 1993)

14. Gary v. Hart, No. 90-3321-RDR, 1993 U.S. Dist. LEXIS 6372 (D. Kan. Apr. 9, 1993)

15. Tornowski v. Hart, No. 90-3293-RDR, 1993 U.S. Dist. LEXIS 4779 (D. Kan. Mar. 26, 1993), aff'd, 10 F.3d 810 (10th Cir. 1993) (table)

16. Chambers v. Berrong, No. 90-3202-RDR, 1993 U.S. Dist. LEXIS 4778 (D. Kan. Mar. 8, 1993)

17. Hubbard v. Berrong, No. 90-3120-RDR, 1993 U.S. Dist. LEXIS 2819 (D. Kan. Feb. 18, 1993), aff'd, 7 F.3d 1045 (10th Cir. 1993) (table).

18. Spindle v. Berrong, No. 90-3026-RDR, 1993 U.S. Dist. LEXIS 2821 (D. Kan. Feb. 4, 1993), aff'd, 996 F.2d 311 (10th Cir.) (table), cert. denied, 114 S. Ct. 478 (1993)

19. Booth v. Hart, No. 90-3524-RDR, 1993 U.S. Dist. LEXIS 2820 (D. Kan. Feb. 4, 1993), aff'd, 5 F.3d 545 (10th Cir. 1993) (table)

20. King v. Berrong, No. 89-3494-RDR, 1993 U.S. Dist. LEXIS 1552 (D. Kan. Jan. 25, 1993)

21. Stottlemire v. United States, No. 89-3465-RDR, 1993 U.S. Dist. LEXIS 1553 (D. Kan. Jan. 12, 1993)
22. Fosnaugh v. Berrong, No. 89-3253-RDR, 1992 U.S. Dist. LEXIS 20427 (D. Kan. Dec. 16, 1992)
23. Rath v. Berrong, No. 89-3440-RDR, 1992 U.S. Dist. LEXIS 20428 (D. Kan. Dec. 14, 1992)
24. Singleton v. Berrong, No. 89-3293-RDR, 1992 U.S. Dist. LEXIS 18916 (D. Kan. Nov. 24, 1992)
25. Erbach v. Berrong, No. 89-3082-RDR, 1992 U.S. Dist. LEXIS 18917 (D. Kan. Nov. 24, 1992)
26. Richardson v. Berrong, No. 89-3146-R, 1992 U.S. Dist. LEXIS 15755 (D. Kan. Sept. 29, 1992)
27. Maracle v. Commandant, No. 88-3482-R, 1992 U.S. Dist. LEXIS 14117 (D. Kan. Aug. 21, 1992)
28. Lips v. Commandant, U.S. Disciplinary Barracks, No. 88-3396-R, 1992 U.S. Dist. LEXIS 12018 (D. Kan. July 31, 1992), *rev'd*, 997 F.2d 808 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994)
29. Shanks v. Zelez, No. 88-3400-R, 1992 U.S. Dist. LEXIS 10268 (D. Kan. June 24, 1992), *aff'd*, 982 F.2d 529 (10th Cir. 1992) (table)
30. Williams v. Commandant, U.S.D.B., No. 90-3427-R, 1992 U.S. Dist. LEXIS 3272 (D. Kan. Feb. 12, 1992)
31. Carr v. Berrong, No. 89-3355-R, 1992 U.S. Dist. LEXIS 2667 (D. Kan. Feb. 4, 1992)

32. Jefferson v. Berrong, 783 F. Supp. 1304 (D. Kan. 1992),  
*aff'd sub nom.* Amen-Ra v. Berrong, 992 F.2d 1222 (10th Cir. 1993)  
(table)